The Dissertation Committee for Daniel Eduardo Ryan Certifies that this is the approved version of the following dissertation:

DEMOCRATIC GOVERNANCE AND THE COURTS: THE POLITICAL SOURCES OF THE JUDICIALIZATION OF PUBLIC POLICY IN ARGENTINA

Committee:

Daniel Brinks, Supervisor

Wendy Hunter

Raul Madrid

H. W. Perry

Jacob Werksman

Kurt Weyland

DEMOCRATIC GOVERNANCE AND THE COURTS: THE POLITICAL SOURCES OF THE JUDICIALIZATION OF PUBLIC POLICY IN ARGENTINA

by

Daniel Eduardo Ryan , J.D., L.L.M.

Dissertation

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

August, 2011

Dedication

A mi querida Tata.

Acknowledgements

A dissertation is a journey in which one receives -and needs- support from many people and institutions. First, I would like to thank my advisor, Daniel Brinks. Dan helped me enormously to define and shape my research project. He was an enthusiastic support of my work and always provided me with very constructive comments which were especially helpful in those times in which the project seemed to be in a deadlock. I am deeply thankful for his guidance and mentorship. I am also very grateful to the other members of my dissertation committee. I am particularly thankful to Kurt Weyland; his immediate feedback and his challenging theoretical and methodological observations helped me a lot to strengthen my research project and argument. Wendy Hunter, Raúl Madrid, H. W. Perry, and Jacob Werksman were extremely supportive and each in their own way, contributed immensely to the development of this project.

I also would like to thank my fellow graduate students, Manuel Balán, Eduardo Dargent and Rodrigo Nunes, who read various drafts of different sections of my project and gave me very useful comments. Similarly, I want to thank the participants in the Latin American Faculty-Student group for their observations and feedback. Furthermore, I am very thankful to the Teresa Lozano Long Institute of Latin American Studies of the University of Texas at Austin, which provided me with the funds to carry out my field

research in Argentina, and to the Government Department at UT, which provided me with financial support during the writing phase of this dissertation.

In Argentina, I am very thankful to many people that, in different ways, helped me to develop this research. I am particularly grateful to Horacio Berstein, Andrés Napoli and Daniel Sabsay for their help in identifying and gaining access to key actors in many of the cases covered by the project. I also would like to thank my former colleagues and the staff from *Fundación Ambiente y Recursos Naturales* (FARN), for their help and logistical support throughout my research. Most of all, I want to especially thank all the people I interviewed and I consulted during my research in Argentina. The time and attention they gave to my questions made this work possible.

In Austin, I would like to mention several institutions that helped me and my family tremendously during the time we lived there. Particularly, I am very thankful to Mathews Elementary School, the Early Childhood Center of the University United Methodist Church, and the UT Married and Graduated Student Housing. Moreover, I would like to thank many friends for their help and company at different points during these years: Javier and Flavia, Emilia and Marcelo, Mariana and Jorge, Laura and Greg, Sofia, and many of our great neighbors at Brackenridge University Apartments.

Finally, I would like to give thanks to my family. To my wife and partner in life, Alejandra, who from the beginning supported my dream of pursuing a doctorate degree in the USA; to my kids, Victoria, Sofia and Martin, whose joy and happiness helped me to go through some very difficult times in this process, and to my parents, who despite the distance, they were always there whenever I needed them.

DEMOCRATIC GOVERNANCE AND THE COURTS: THE POLITICAL SOURCES OF THE JUDICIALIZATION OF PUBLIC POLICY IN ARGENTINA

Publication No._____

Daniel Eduardo Ryan, PhD

The University of Texas at Austin, 2011

Supervisor: Daniel Brinks

The purpose of this dissertation is to examine under what political conditions public policy issues are likely to become judicialized in Argentina. This study shows that the most widespread theoretical explanation, the loser argument, is too general and does not provide much analytical insight about the relationship between the political context and the judicialization of policy. Meanwhile, other explanations developed by the literature, mainly the politically disadvantaged group and the fragmented legislative power, although theoretically valid, have a limited empirical coverage and cannot fully explain the phenomenon of policy judicialization in Argentina. Taking into account the limitations and contributions of the existing theories, the theoretical argument of this dissertation is predicated upon the idea that there are various, alternative political scenarios under which judicialization is likely to occur. In other words, there is not just one, but several, different political conditions or combinations of conditions that might trigger the involvement of courts in public policy. Within this conceptual framework, the

dissertation argues that policy disputes are likely to become judicialized under two political scenarios which have not been considered by the existing literature: first, when the state apparatus is unable to implement or enforce policy goals and mandates already approved by the political branches of government, and second, when the political elites in charge of the executive do not fully support existing policy mandates, and the legislature is too passive or deferential to the government regarding that policy issue. In these types of political contexts, social actors are likely to judicialize their policy claims. To assess these arguments, the dissertation develops a qualitative comparative analysis (QCA) of 13 major policy conflicts that occurred in Argentina during the last two decades, complemented by case studies. As a result of my analysis, I identify three combinations of political conditions that are sufficient to trigger the judicialization of policy in Argentina. Two of these combinations clearly fit with my theoretical argument and expectations about what political scenarios are likely to lead to policy judicialization, while the third combination closely reflects the political disadvantage argument.

Table of Contents

List of Tables

CHAPTER 1: INTRODUCCION

This dissertation is about the relationship between democratic governance and the judicialization of public policy. More specifically, it analyzes the political conditions that drive the demand for judicial involvement in public policy issues. In this way, it is an attempt to go beyond the simplistic but largely accepted conventional argument that policy "losers" (those that cannot achieve their policy goals through the traditional policymaking venues) are the ones who turn to the judiciary. That argument tends to oversimplify how democratic governance works and how it is linked to the phenomenon of judicialization. This dissertation, instead, precisely focuses on that relationship by identifying and analyzing the political conditions that are likely to lead social actors to use courts and judicial procedures to contest government's policies.

Argentina is a good case in which to study this relationship. Since the return to democracy in 1983, Argentina has made important advances in terms of institutionalizing electoral competition and pluralism. From 1983 up to date, there have been six presidential elections with peaceful alternations of different political coalitions in charge of the national government.[1] Moreover, despite the dominance of the Peronist party (especially after the crisis of 2001),[2] the country has a relatively competitive party system. Argentina has also made significant advances in guaranteeing the basic institutional framework for political participation. The country enjoys satisfactory levels of freedom of opinion and association, free press, and has not experienced political persecutions or sustained state repression of political activities since the restoration of

[1] This is the longest period of democratic governments without interruption since 1930.

[2] During the political and economic crisis of December 2001, the country suffered successive changes of government in a period of few weeks. It is worth noting that, for most observers of Argentine politics, the political regime was not at risk despite the seriousness of the political crisis.

democracy.[3] In short, all these features speak of a relatively open system of governance, in which societal actors can politically organize themselves and pose their demands on the state.

Interestingly, as the political system has become more open and accessible, Argentina has also experienced an increasing judicialization of public policy issues (Maurino et al. 2005; Smulovitz 2005, 2007). That is, social actors have increasingly turned to the courts to achieve their policy goals instead of pursuing them exclusively or mainly through the traditional political venues, the executive and the legislature. I briefly mention three examples just to illustrate this phenomenon. During the 1990s, the Argentine congress passed very progressive legislation regarding HIV-AIDS, and the executive branch of government established programs aiming to provide health coverage and medicines to people living with HIV-AIDS. However, the provision of medicines and health treatments was intermittent and suffered multiple problems, and by 1996-1997 associations and groups working on HIV-AIDS issues judicialized their claims regarding the government's policy on this matter. Another illustrative example, from a different policy field, is the judicialization of the indigenous land policy in Jujuy. Between 1996 and 2000, the government of the province of Jujuy signed agreements with the national government establishing a program to regularize the land tenure status of indigenous communities in the province, known as PRATPAJ, and the provincial legislature ratified those agreements. However, the PRATPAJ was barely implemented by the province, and by 2003 the involved indigenous communities judicialized their policy claims against the provincial government. The third example refers to the policy disputes regarding the Matanza-Riachuelo basin, one of the most polluted areas in Argentina. During the 1990s,

[3] For the period 1994-2008, Freedom House scores ranked Argentina in a second tier of countries in Latin America regarding the protection of political rights and civil liberties, below Uruguay, Costa Rica and Chile (the Latin American countries with the best scores), but above Brazil and Mexico (Freedom House data cited by Mainwaring et al. 2010, 17-18).

the policy claims and debate about what to do in the Riachuelo developed mainly through the traditional policymaking venues (governmental agencies, and to much lesser extent in the national and local legislatures); there was an increased but fragmented societal demand to clean up the basin, and there were several, failed governmental attempts to deal with this problem. During the 2000s, however, legal claims were brought to the Supreme Court about the pollution affecting the basin, and the policy debate and process about the Riachuelo began to develop mainly through judicial procedures.

As these examples suggest, courts and judicial procedures have become a central venue through which social actors attempt to advance their policy agenda and achieve their policy goals in the post-transitional Argentine democracy. The question is why? If the political system has become more open and accessible, why are social actors increasingly turning to non-elected, non-democratically accountable courts to pursue their policy agendas? What are the political reasons that account for this phenomenon? Is it just that those actors that lose in the political arena then turn to the courts, as the political loser argument suggests? However, in all the examples briefly described above, the groups came to the courts with legal resources acquired through the policy process. Are there other political features of how the Argentinean democratic polity works that lead social actors to judicialize their policy claims?

Before embarking in the search for these answers, it is necessary to clearly conceptualize this phenomenon; in other words: what do I mean by the judicialization of public policy. After that, I briefly present my main arguments and research methodology. Finally, I provide a "road map" for the rest of the dissertation.

DEFINING POLICY JUDICIALIZATION

In its most basic terms, policy judicialization refers to the involvement of courts and judicial procedures in public policy processes. Following the literature on policy studies, the policy process is conceptualized as including the formulation as well as the implementation and revision of authoritative government decisions and measures (Theodoulou and Cahn 1995; Sabatier 1999). A distinguishing characteristic of these type of cases is the collective nature of the disputes brought to the courts.[4] In other words, these are disputes involving the making, implementation or reform of government decisions that affect broad sectors of the population of a polity. The increasing recourse to the judiciary on these issues clearly contrasts with the classical image of the courts as adjudicating individual disputes arising from personal grievances (Horowitz 1977). Moreover, these are issues that, historically, had been a rather exclusive domain of the "political" branches of government – the executive and the legislature (Tate and Vallinder 1995).

This notion of policy judicialization merits two further clarifications. First, the critical element for the judicialization of policy is not that legal claims are brought to the courts (although this is obviously necessary), but that the judiciary and judicial procedures become a central venue for the unfolding of the policy process and debate. Initial works on the judicialization of policy have framed this distinguishing feature in terms of the displacement of policy decision-making from the executive and legislature to

[4] A public policy can also become judicialized as result of a massive number of individual legal claims regarding a specific content of a policy or how it is implemented, etc. Although each individual case might affect only the parties to that legal case, the mere addition of a great number of similar individual legal complaints allows for considering a certain policy as judicialized. A good example of this dynamic is the conflict over the freeze on savings deposits enacted by the Argentina government in 2001-2002 (the famous *"corralito"*), and the successive waves of individual legal complaints that overwhelmed the Argentine court system during the first part of the 2000's. For a more detailed political analysis of the process of judicialization of this dispute see Smulovitz (2005).

the judiciary. For instance, Tate and Vallinder (1995, 28), probably the most cited work on this matter, conceptualize judicialization as courts and judges *"...dominat[ing] the making of public policies that had previously been made...by other governmental agencies..."*. More recent work, however, also stresses that the involvement of the courts in policy disputes generate alternative new scenarios for policy negotiations, without necessarily displacing the other branches of government. For instance, based on their comparative analysis of socioeconomic right litigation in the developing world countries, Brinks and Gauri (2008) conclude that judicialization (or their preferred term, legalization) is not so much about the courts closing off debates in the more representative venues as adding another venue and injecting new elements into the policy debate. In sum, regardless of whether judicial procedures "displace" the other branches of government or "add" another institutional setting for negotiation, it is clear that the key feature in the conceptualization of the phenomenon of judicialization is that courts become a main venue in which a policy process and debate evolves.

Second, the involvement of courts and judicial procedures in policy processes can take different formats.[5] Judicial review, that is the power of the judiciary to invalidate government policies that are inconsistent with constitutional rules, is undoubtedly the primary way by which courts can become involved in public policies. For instance, the famous school desegregation decision in Brown v. Board of Education (1954) is a paradigmatic example of the policy implications of the exercise of judicial review in the US context. Courts may also go beyond just determining whether the constitution has been violated, to become involved in defining the remedies establishing (with different levels of specificity) what governments have to do to meet unfulfilled constitutional obligations (Tushnet 2004). After Brown v. Board of Education, for instance, federal

[5] For a simple but informative overview of different types of judicial policymaking, see Tarr (2010, 256-265).

courts got involved in devising school desegregation plans over southern states and school districts that failed to eliminate racial segregation in their public school systems. At the same time, although constitutional cases usually receive most attention, the judicialization of policy is not just about judicial review. Courts get deeply involved in public policy in other ways, such as through statutory interpretation. Policy disputes often arise over the meaning of a statute and its application, or whether a statute applies to a certain situation or actors or not. Courts' choices on these matters often have profound policy implications, affecting not only the parties involved in the litigation, but also broad sectors of society. In the US, for example, the legislation approved by congress requiring federal agencies to file environmental impact assessments was the object of a long wave of environmental litigation during the 1970's, which finally defined the scope of that policy (Handler 1978, 44-48). In short, as these examples indicate, judicial involvement in policy disputes can take different forms. In all cases, the distinguishing feature is that the judicialization of the disputes is crucial in the process of defining and implementing those policies.

THE ARGUMENT IN BRIEF

At its most basic level, the central claim of this dissertation is that the judicialization of public policy does not occur in a political vacuum. On the contrary, this study argues there are certain regularities, certain patterns in how a democratic polity works that drive the demand for judicial involvement in policy issues. This is an aspect of the phenomenon of judicialization which –with exceptions- has largely been overlooked by the literature on legal mobilization and judicial power. Scholarly work in this field has mainly focused on those factors that make it possible for actors to turn to the courts and judicialization to occur. Different explanations have rightly stressed the relevance of

actors having an easy access to the judiciary (González Morales 1997; Wilson and Rodriguez Cordero 2006; Smulovitz 2007), the centrality of independent judges and courts (Chavez 2004; Brinks 2005; Ríos-Figueroa and Taylor 2006),[6] and the importance of a support structure for litigation (Epp 1998). These factors identified by the literature can be considered as enabling conditions which make it possible for judicialization to happen; cases (whether countries or specific policy issues) lacking any of these basic elements are unlikely to experience significant processes of policy litigation. However, these enabling conditions, by themselves, cannot account for the political reasons and factors that trigger the demand for judicialization of public policy in the first place, which is precisely the focus of this study. In other words, why public are policy issues judicialized instead of addressed and resolved through the traditional political venues?

The conventional answer to this question is that the losers (or likely losers) of policymaking processes are the ones who turn to the courts because they cannot achieve their goals through the traditional political forum. As I will analyze in detail in the next chapter, this argument is too general and does not provide too much insight into the political contexts and factors leading to the judicialization of policy disputes. In this type of dispute, there is always a party that can be considered as a loser of the policy process or negotiation; otherwise if the involved actors had obtained what they want from the policy process in the first place, there would be no reason to judicialize.

Besides the policy loser argument mentioned above, there are other two theoretical explanations that have received attention by the literature. In brief, one stresses that policy litigation is mainly pursued by politically disadvantaged groups that have limited capabilities or possibilities to access and affect democratic policymaking (Cortner 1968; Sathe 2002). Meanwhile, the other argues that policy judicialization is

[6] The literature on judicial independence is very abundant. Here I have just cited some works analyzing the issue of judicial independence in the Latin American context.

basically a result of legislative fragmentation and stalemate, which drive actors to the courts in search of policy responses that elected policymaking institutions are unable to offer (Edelman 1995; Ferejohn 2002; Whittington 2005). Both of these arguments make an important contribution by identifying some of the key political conditions triggering processes of policy judicialization. However, as I show in this study, these explanations have limited empirical coverage, especially in the Argentinean context. They are able to account for certain processes of judicialization, but not for others. In particular, these theoretical arguments do not address, and therefore cannot really explain, processes of policy judicialization related to the lack of enforcement or implementation of existing legislation.

Taking into account the limitations but also the contributions of the existing explanations briefly discussed above, the theoretical argument developed by this dissertation is built upon the idea that there are various, alternative political scenarios which are likely to drive the judicialization of public policy. In other words, no single political condition or factor provides a catch – all explanation of the phenomenon of policy judicialization; on the contrary, there are several, different political conditions or combinations of conditions that trigger the involvement of courts in policy issues.

Within this general conceptual framework that assumes the possibility of equifinality, this dissertation identifies two sources of policy judicialization which do not fit within the existing explanations developed by the literature. Specifically, my dissertation argues that the judicialization of policy can also be triggered by weak rule of law scenarios. In these political contexts, the policy goals and measures demanded and claimed by social actors are already part of the existing normative framework, but these goals and mandates are not realized in practice because either the state apparatus is unable to implement or enforce these policies, or the political elites in charge of the

executive do not fully support those existing policies, and the legislature is too passive and deferential towards the executive on that policy issue. In sum, when public policy processes take place in these types of weak rule of law scenarios, social actors are likely to turn to the courts to pursue policy responses to their claims.

Relevance

By addressing the political conditions leading to the judicialization of policy, this dissertation speaks to three questions of practical and theoretical relevance. First, what does the phenomenon of policy judicialization tell us about the quality of democratic governance? Citizens' legal mobilization through the courts is often perceived as evidence of a solid or consolidating democracy; it speaks of a polity invested in the protection of the rule of law, and where the system of checks and balances between the different branches of government seems to work. However, the judicialization of public policy might also be indicating certain weaknesses of how a democratic polity works (Sieder et al. 2005). In other words, deficits of the system of governance might help the courts and judicial procedures to become an important resort -or even the last resort- for the resolution of certain policy issues and debates.

This is particularly relevant in the context of post - transitional democracies in Latin America, as is the case of Argentina. While the processes of democratization in the region have moved forward in terms of institutionalizing electoral competition, democratic polities still face many problems. Fragile mechanisms of government accountability, extended corruption and clientelistic practices are some of the main weaknesses generally attributed to many democracies in Latin America (O'Donnell 1993, 1994; Agüero 1998). Thus, the quality of democratic governance rather than democratic stability has become the main issue of concern for scholars and political actors in the

region (Munck 2004a; Mainwaring and Scully 2010).[7] In this context, the phenomenon of policy judicialization, of social actors turning to the courts instead of pursuing their policy agendas exclusively or mainly through political venues, opens new possibilities to study how democratic polities work.

Second, is the judicialization of public policy mainly a result of the dynamics of the policymaking process, or is it rather related to how state power is exercised once policies are already made? Most of the literature on judicialization tends to focus on policy litigation triggered by groups that cannot obtain their goals through the political process (Cortner 1968; Sathe 2002) or as result the political fragmentation and gridlock in the policymaking processes (Clayton 1992; Tate 1995; Edelman 1995; Ferejohn 2002; Whittington 2005). Other studies, however, show that policy litigation springs largely from disputes resulting from lack of implementation or weak enforcement of democratically sanctioned regulations (Olson 1984; Brinks and Gauri 2008). In short, what political factors drive the demand for judicial intervention in public policy issues?

Finally, is the judicialization of policy disputes basically a countermajoritarian phenomenon, as traditionally has been suggested by the literature, or can it be a way to overcome obstacles to democratic politics? Generally, the courts are conceived as a venue in which minorities seek to protect their rights and interests against the will of the majorities, regardless of whether they are powerless and voiceless minorities (Ely 1980; Dworkin 1985), or strong and powerful ones (Hirschl 2004). However, the courts can also function as a vehicle for overcoming political barriers that hamper policies enjoying broad political and societal support (Graber 1993; Whittington 2005), or as a fire alarm

[7] Following Mainwaring, Scully and Vargas Cullel (2010), by democratic governance, I broadly refer to the processes by which the state formulates and implements policies within the conditions and institutions of democracy. This conceptualization stresses that the exercise of state power in a democracy presents distinctive challenges, advantages and problems compared to governing under others types of political system.

system, signaling when there are deficits in how the state bureaucracy implements policy commitments made by elected branches of government (Brinks and Gauri 2008). By analysing under what circumstances social groups bring policy issues to the judicial spheres in Argentina, this project also assesses these rival views about the political role of courts in a democracy.

RESEARCH DESIGN AND METHODOLOGY

Case Selection

In order to assess under what political conditions public policy is likely to become judicialized, this dissertation examines 13 major policy conflicts that occurred in Argentina during the last two decades.[8] The cases come from four different policy fields: environment, consumer protection, health care and indigenous people's rights. These policy sectors show some of the highest levels of policy litigation in Argentina. Maurino, Nino and Sigal (2005) calculate that environmental and consumer protection litigation represent around 51% of the total of *"recursos de amparos"* submitted to Argentine courts between 1987 and 2004.[9] Bergallo (2010) reports that only one judicial decision on health care issues was published by the main legal journals for practicing lawyers in Argentina in 1987, while there were 81 and 75 decisions published in 2006 and 2007

[8] The constitutional reform of 1994 provides a baseline for the selection of cases. Article 43 of the reformed Argentine constitution recognizes broad legal standing to various actors to bring claims of diffuse or "collective nature" to the courts. Before the constitutional reform, it was very unlikely that this type of legal claims would be admitted in court, although there were exceptions (for instance, "Kattan, Alberto E. y otro c/ Gobierno Nacional -Poder Ejecutivo" 1983).

[9] A *"recurso de amparo"* is, essentially, a summary judicial procedure for the protection of basic individual and collective rights. Article 43 (first paragraph) of the 1994 Argentine constitution states: *"Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule…"*

respectively. I did not find specific figures about indigenous rights litigation, although scholars and activists also consider it as one of the most dynamic areas of policy and rights litigation in Argentina.[10] More importantly, policy disputes related to indigenous rights represent a hard test for our argument. Indigenous groups are a clear example of historically disadvantaged groups in Argentina, and therefore, it is reasonable to expect -a priori- that policy judicialization in this field is more likely to be triggered by the low political leverage of indigenous groups than by state deficiencies or weak horizontal accountability. In short, all these policy fields are empirically and theoretically relevant for any study about the judicialization of public policy in Argentina.

Within each policy field, the specific policy conflicts were selected based on a combination of expert opinion and reviews of specialized literature, although the weight of each of these sources varied according to the policy field (for a more detailed explanation on the process of selecting the cases in each policy field, and on the conceptualization and selection of the negative cases see Appendix B). This method of selection had two main advantages. First, it ensured that the selected positive cases were perceived by experts and activists as judicialized disputes which had clear policy relevance and a broad impact. In other words, it ensured that the cases were "representative" of the particular type of litigation under analysis.[11] As explained above, this study is not interested in individual claims arising from personal grievances, but in those that have a "collective" or "diffuse" nature. These are cases in which potential

[10] See, for instance, the increasing coverage given to indigenous rights litigation by the different CELS's Annual Reports on Human Rights in Argentina (reports available at http://www.cels.org.ar/documentos/), as well as by the annual national ombudsman reports (reports available at www.dpn.gob.ar/index.php).

[11] The cases have not been selected on the basis of a random sample, and therefore they cannot be considered representative from a statistical point of view. However, following Horowitz (1977) and Handler (1978), I use the term representative with a more modest meaning, to stress that the selected cases are not "aberrational". That is, the selected cases are not deviations from what can be generally considered to be typical cases of judicialization of public policy issues. In other words, the selected cases share the same basic characteristics of the larger population of judicialized policy disputes.

outcomes of the judicial procedures are likely to have broad policy implications, affecting not only the parties involved in the litigation, but also larger sectors of society. Second, by involving a pool of experts in the selection process, I reduced my margin of subjectivity in the selection of cases, avoiding the risk of including disputes that might favor one explanation over the others. In this way, I averted a very common and severe risk of selection bias in qualitative research (George and Bennett 2004).

Methods

In order to analyze the political conditions under which these 13 policy conflicts develop, I carry out a qualitative comparative analysis using fuzzy sets (fsQCA). Two main reasons justify the use of QCA approach and techniques in this study. First, QCA facilitates the study of causal complexity. Instead of a linear and additive analysis of causality, QCA views causation as conjunctural and heterogeneous (Ragin 2000). Causal conditions, then, might combine in different ways to produce the same outcome; furthermore, the effect of any particular condition may depend on the presence or absence of other conditions. In this way, QCA is especially suited to identify and appraise different alternative combinations of political conditions that might lead to the same result: the judicialization of public policy disputes.

Second, as a technique, QCA makes it easier to develop and present comparative qualitative analysis of several cases. A common problem in qualitative analysis of more than just few cases is that, in many instances, the comparison of the cases can be rather loose (Rihoux and Lobe 2009). QCA, instead, allows researchers to systematize similarities and differences across several cases through the use of "truth tables", and in that way, it helps to examine complex patterns of causation and to identify basic causal configurations (minimal formulas) that might be related to the outcome under study.

Once I have obtained the results from the QCA analysis, I return to the cases. In this second part of the research, I develop detailed case studies of almost all of the 13 policy disputes encompassed by the QCA. The purpose of the case studies is twofold. First, they allow for evaluating the fsQCA coding of the outcome and causal conditions of each of the policy disputes. In this way, the case studies help to strength the validity and transparency of the QCA analysis. Second, they also allow for assessing the internal validity of the causal configurations (minimal formulas) identified through the QCA analysis. In other words, the case studies allow for evaluating whether the "thick", historical narratives and analysis of the cases reflect the basic, causal configurations resulting from the QCA. In sum, methodologically, this research is developed in two distinctive but clearly complementary stages: first, the fsQCA analysis, and then, the case studies.

Data

The data for the QCA analysis and the case studies was mainly obtained through archival research, complemented by semi-structured interviews. For each policy dispute I reviewed an extensive collection of documents including the relevant judicial resolutions (and when available, the plaintiff's legal complaints and governments' legal responses), reports produced by governmental agencies (for instance, ombudsman's office), congressional records, public statements and reports produced by associations and other non-governmental actors involved in the conflicts, and other secondary sources. In every dispute, I did a detailed review of the media coverage of local and/or national newspapers. Furthermore, I carried out semi-structured interviews with relevant experts and individuals involved in each of the policy disputes. In all the cases, I interviewed at

least one of the leaders or main activists of the social groups involved in the policy dispute, or their main lawyer. Appendix A lists all the interviews.

The weight of the different type of documents and sources varied according to the dispute under study. In many cases, there was abundant secondary literature describing and analyzing different aspects of the historical development of a policy dispute (that was the case, for instance, of the dispute about the re-structuring of the phone tariffs during the Menem administration, the conflict about indigenous land tenure rights in Salta, or the dispute about mining in Esquel). In other cases, instead, there were no written historical accounts of the policy processes. Therefore my research had to "reconstruct" those processes with pieces of information from different sources.

ORGANIZATION OF THE DISSERTATION

As explained before, the purpose of this dissertation is to examine under what political conditions public policy issues are likely to become judicialized in Argentina. The following chapter (Ch. 2) develops the theoretical framework to address and answer that question. It shows that the most widespread theoretical explanation, the loser argument, is too general and does not provide much analytical insight about the relationship between the political context and the judicialization of policy. Meanwhile, other explanations developed by the literature, mainly the politically disadvantaged group and the fragmented legislative power, although theoretically valid, have a limited empirical coverage and cannot fully explain the phenomenon of policy judicialization in Argentina. Taking into account these limitations, but also the contributions of the existing theories, the theoretical argument of this dissertation is predicated upon the idea that there are various, alternative political scenarios under which the judicialization of public policy is likely to occur. In other words, there is not just one, but several, different political

conditions or combinations of conditions that might trigger the involvement of courts in policy processes and disputes. Within this conceptual framework, the dissertation argues that policy disputes are likely to become judicialized under two political scenarios which have not been considered by the existing literature: first, when the state apparatus is unable to implement or enforce policy goals and mandates already approved by the political branches of government, and second, when the political elites in charge of the executive do not fully support existing policy mandates and rules, and the legislature is too passive or deferential to the government regarding that policy issue. In these types of political contexts, social actors are likely to turn to the courts and judicialize their policy claims.

Chapter 3 assesses these arguments by developing a fsQCA analysis of 13 mayor policy disputes that occurred in Argentina during the last couples of decades. I built one (1) fuzzy set for the outcome, the judicialization of policy disputes, and five (5) fuzzy sets to assess the political conditions that might trigger processes of judicialization. These five conditions are based on the theoretical arguments and explanations developed in chapter 2. These conditions are: policy loser, the weak political leverage, passive legislature, opposition of the executive and deficient state capacity. As a result of the fsQCA analysis, I identify three (3) combinations of political conditions that are sufficient to trigger the judicialization of policy in Argentina. Two of these combinations clearly fit with my theoretical argument and expectations about what political scenarios are likely to lead to policy judicialization, while the third combination closely reflects the political disadvantage argument. Finally, I am also able to identify one (1) combination of conditions under which judicialization is likely to be extremely weak or not likely to occur at all.

The following three chapters develop detailed historical narratives of the policy conflicts encompassed by each of the political scenarios identified thought the fsQCA. Chapter 4 describes and compares three of the cases of judicialization of public policy in Argentina: the 2007 health and food emergency affecting the indigenous communities in Chaco, the provision of treatment and medicines to people living with HIV-AIDS during the 1990s, and the production of the vaccine against the Argentine hemorrhagic fever or *"mal de los rastrojos."* These three cases shared a common, basic pattern: the involvement of the courts in these policy disputes occurred in contexts in which the legislature and the executive were attentive to the issues, and sometimes even supportive of the policies in question, but the state apparatus was ill prepared to fully implement/enforce them. In short, these three cases share a causal configuration built around the weak capability of the state apparatus to fulfill existing policy mandates. The involvement of the courts in these disputes, then, was triggered by deficiencies at the level of the state rather than problems in the political system.

Chapter 5 analyzes in detail three other cases of policy judicialization in Argentina: the land tenure program for indigenous communities in Jujuy, CEAMSE's waste disposal policy in the Punta Lara landfill, and the re-negotiation of the public utilities concessions during Duhalde's government. It also briefly analyzes a dispute about indigenous land rights in the province of Salta. All these cases shared a common pattern: the judicialization of these policy issues occurred in contexts in which the governments did not implement or enforce existing policies, and the legislatures were quite passive. In short, this configuration stresses that the discretionary exercise of power by the executive and the weaknesses of legislative oversight were the main political conditions triggering the judicialization of policy.

Chapter 6 describes and compares in detail three other cases: the re-structuring of the phone tariffs during the Menem administration, the dispute about oil drilling in the Llancanelo wetlands in Mendoza, and the re-negotiation of the metropolitan train concessions during the 1990s. It also analyzes, although briefly, the conflict over environmental pollution in the Matanza-Riachuelo basin. All these cases shared one basic pattern: the judicialization of these policy issues was triggered by social actors with very low political leverage, unable to modify the existing status quo in a certain policy field or to block policy reforms promoted by the governments. In short, this configuration is the paradigmatic example of judicialization driven by politically disadvantaged groups.

In turn, chapter 7 analyzes cases of weak judicialization (which are the negative cases of this study). The chapter compares two policy disputes: the Esquel case about mining policy in the province of Chubut, and the health coverage reform for disabled people promoted by the national government in 2002. These are cases in which legal claims were brought to the judiciary, but the courts and judicial procedures played a very minor role and were not relevant in the unfolding of these policy processes. The analysis of these cases suggests that when the involved social actors have political leverage, and the legislature is attentive and active, a policy dispute is not likely to become fully judicialized even if the executive is initially opposed to the policy demands made by social actors. The interesting aspect of this configuration is how this combination between an active legislature and actors with political leverage can counterbalance and contain the executive's exercise of power. Moreover, these cases suggest that, in this type of political scenarios, policy issues are unlikely to become fully judicialized, because the social actors have other political venues available and open to them.

Finally, chapter 8 concludes the project. It summarizes the main arguments and findings of the dissertation, and outlines its theoretical and empirical implications.

Furthermore, it stresses how this study provides a framework for analyzing how the working of a particular system of democratic governance might affect the judicialization of public policy issues.

CHAPTER 2: POLITICAL CAUSES OF THE JUDICIALIZATION OF PUBLIC POLICY

As stated in the introductory chapter, this study argues there are certain regularities, certain patterns in how a democratic polity works that drive the demand for judicial intervention in public policy issues and disputes. The largely accepted conventional argument that policy "losers" (those that cannot achieve their policy goals through the traditional policymaking venues) are the ones who tend to litigate, oversimplifies the functioning of democratic governance and how it is linked to the phenomenon of judicialization. Moreover, my empirical work in Argentina shows that very often social actors come to the courts with legal resources acquired through the policy process, and therefore, they can hardly be considered losers of the policymaking process. Thus, why do actors turn to the courts (a non-elected, non democratically-accountable branch of government) instead of pursuing their goals mainly through the traditional political venues, the legislature or the executive? Are there other political features of how a democratic polity works that lead social actors to judicialize their policy claims?

In this chapter, I attempt to provide a theoretical framework to answer those questions. First, I briefly analyze those conditions that enable judicialization to occur. These conditions constitute the scope of applicability of my argument. Second, I review alternative theoretical explanations developed by the specialized literature. Finally, drawing on the limitations but also on the contributions of the existing explanations, I present and develop my own theoretical argument.

DEFINING THE SCOPE OF THE ARGUMENT: ENABLING CONDITIONS FOR JUDICIALIZATION

Before we can analyze whether and how the quality of governance is related to policy judicialization in a democratic polity, certain conditions have to be present in the first place in order for judicialization to occur. Based on the literature on legal mobilization and judicial politics, one can identify three main sets of enabling conditions for judicialization: a favorable legal framework, a relatively autonomous judiciary and a certain basic level of organizational support for policy litigation.

A favorable legal framework mainly refers to the substantive and especially the procedural rules that govern the access to courts. Low judicial costs and, especially, broad legal standing regulations (which refer to the right to bring a claim to a court) are considered to be key factors facilitating citizens´ access to the judicial system (González Morales 1997; Wilson and Rodriguez Cordero 2006). For instance, the Argentine constitution reformed in 1994 grants broad legal standing to the ombudsman, affected parties and NGOs to bring claims of a "collective nature" to the courts (article 43). Before 1994, it was very unlikely that this type of legal claims would be admitted by Argentine courts.

Moreover, policy judicialization tends to occur when the judiciary is relatively autonomous from the government, and it is open to and receptive to this type of claims. Judges decide whether particular policy demands will be accepted or rejected and, ultimately, who wins and who loses; in that way, they can encourage (or not) other actors to bring their policy claims to the courts. A good example of this dynamic was the jurisprudential evolution about the extent of the legal standing established by article 43 of the 1994 Argentine Constitution. During the first years after the reform, there were some

intense doctrinal disputes about this issue.[12] However, Argentine courts steadily supported interpretations of the constitutional text which did not restrict the legal standing of individuals and associations to file judicial claims on behalf of diffuse interests. In this way, the courts were signaling that they were open and willing to hear this type of collective claims. Certainly, the relevance of judicial leadership heavily depends on the structural autonomy of the courts; that is, the institutional arrangements protecting the courts from external pressures.[13] If the courts operate within an institutional framework that protects them from government, this allows judges to resolve policy disputes according to their preferred legal interpretations. In this context, people are more likely to judicially contest government's policies and behavior (Gloppen 2006).

Finally, the judicialization of policy issues also depends on the existence of a certain level of organizational support for policy litigation. The existence of organized social actors capable of using litigation in a strategic and sustained manner, the availability of lawyers willing to take this type of cases as well as funding to cover litigation costs, are some of the main organizational factors stressed by activists and academics. Support structures, then, facilitate and articulate the resources (legal knowledge, specialized lawyers, money, etc.) that allow social actors to bring and sustain

[12] One of the main doctrinal debates was about the extent of the term "affected party" mentioned by article 43 of the Constitution. For more traditional or conservative legal approaches to the issue of legal standing, the term ¨affected party¨ just referred to individuals whose personal rights and interests were being harmed. Thus, individuals were not legitimized to bring legal claims on behalf of collective, diffuse interests. That was historically the role of the state. The alternative view basically argued the term "affected" referred to people who in spite of not suffering a personal and direct damage or threat, can claim certain type of relation or interest with the collective good which is being affected or harmed. This interpretation clearly provided broader legal standing for the protection of interests of "collective or diffuse" nature (for a more detailed analysis see Sabsay 1997).

[13] For a general discussion on judicial independence see Russell & O'Brien (2001). For a more specific discussion of judicial independence in the Latin American context, including Argentina see Iaryczower et al (2002), Chavez (2004), Brinks (2005), Ríos Figueroa and Taylor (2006), and Kapiszewski and Taylor (2008).

this type of claims at the courts (Galanter 1974; Epp 1998; in relation to Argentina see Smulovitz 2007).

In conclusion, all these factors affect the prospects of policy judicialization. A relatively autonomous judiciary, a favorable legal framework and a certain level of social and organizational support, are rightly seen as enabling conditions for judicialization to occur.[14] These conditions, then, set the scope of applicability of the theoretical proposition of this study.[15] Cases that completely lack any of them are unlikely to experience significant processes of policy litigation, and therefore, are of no use for analyzing the relationship between quality of governance and the judicialization of policy issues. However, it is important to stress that these enabling conditions, by themselves, cannot explain what triggers judicialization in the first place. In other words, they provide the "structure of opportunity" for taking policy claims to the courts, but they cannot account for the political factors leading to the judicialization of policy issues, neither for the political conditions under which the courts and judicial procedures may become a main venue for the policy negotiations and debate surrounding a particular public policy.

WHAT POLITICAL CONDITIONS TRIGGER THE JUDICIALIZATION OF POLICY? EXISTING EXPLANATIONS

Assuming that the conditions enabling judicialization are present, then, one can pose the question of why public policy issues are judicialized instead of addressed and

[14] Based on Ragin (2000), Mahoney (2004) and other qualitative researchers I am conceptualizing these as necessary, enabling conditions in a probabilistic fashion. Furthermore, I am not arguing that these three sets of conditions have equal causal weight. On the contrary, these conditions may combine in different ways to contribute to the same outcome. For instance, it can be argued that the level of organizational support needed to judicialize a policy claim in Argentina is relatively lower in comparison to what is needed in other countries. In part, this can be explained by low judicial costs and legislation granting very broad legal standing to access to the courts in defense of collective interests. In contrast, Epp (1998) argues that in the cases of the USA and Canada, the development of a litigation support structure has been the key factor in increasing the levels of rights litigation in those countries.

[15] For a detailed discussion on the notion of scope conditions see Mahoney & Goertz (2004).

resolved through the traditional political forums of the legislature and the executive. The conventional response is that the "losers" (or likely losers) of a policymaking process are the ones who turn to the courts, because they cannot achieve their policy goals through the other branches of government. France, with its Constitutional Council and its process of abstract judicial review, is frequently cited as a paradigmatic example of this dynamic, by which opposition parties defeated in the parliamentary arena resort to the courts in an attempt to defeat the government's policy proposals (Stone Sweet 2000). Similarly, most of the literature on interest-group litigation is basically built around the premise that groups litigate when it is more likely that they can attain their goals through the courts than through the elected political institutions or the bureaucracy (for a review of this literature see S. Olson 1990). More recently, theorizations about the adoption and institutional design of judicial review are also basically built around the idea that political losers are the ones who turn to the courts. Ginsburg (2003), for instance, argues that during periods of constitutional design, political actors that see themselves losing in future elections will favor strong judicial review and easy access to the courts as a sort of insurance mechanism against future political majorities. Similarly, Hirsch's theory of hegemonic preservation (2004) argues that current ruling elites promote judicial empowerment as a way to protect their policy preferences and interests from future majoritarian politics.

At first sight, the loser argument seems a very reasonable and parsimonious explanation. Furthermore, it fits very well with the traditional view of the courts as defenders of political minorities against the potential abuses of majoritarian institutions. However, when studied in depth, an analysis merely framed in terms of winners and losers of conventional politics does not provide too much insight into the phenomenon of judicialization of policy disputes. In such cases there is always a party who can be

broadly labelled as a loser. Otherwise, if the actors involved in the policy negotiations have obtained what they want from the state in the first place, there would be no reason to bring a lawsuit. Moreover, many times groups come to the courts with legal resources acquired through the political process, seeking to enforce them against the state (Galanter 1974; S. Olson 1990; Brinks and Gauri 2008). Arguably, these groups cannot be considered "policy losers" in a strict sense.

More importantly, this explanation implies a very linear and non-problematized view of democratic politics. It assumes a regular functioning of the system of governance. It does not raise questions about whether the losers' opinions and views could be heard in the policy process, or whether the disputed policies were taken and approved according to the proper rules of a democratic polity, or whether the state was properly upholding laws and regulations already in force. In short, this standard explanation of winners and losers is too general, it does not give us insights on whether and how the modes in which a democratic polity works might affect or lead to the judicialization of policy issues; ultimately, it does not help us to analyze the relationship between the quality of democratic governance and the processes of policy judicialization.

Besides the loser argument, in the literature on judicial politics and legal mobilization there are two other main explanations about how political conditions affect the judicialization of policy issues. These are the political disadvantage and the political fragmentation arguments.

The first one focuses on the social groups making claims on the state, and on their ability to access and influence the policy process. In this view, policy litigation is basically pursued by politically disadvantaged groups that have limited capabilities or possibilities to affect majoritarian or regulatory policy processes (Cortner 1968; Sathe

2002). In a way, this seems to be just another formulation of the loser argument: social groups turn to litigation when their policy goals are unattainable in other political forums. However, while the loser argument is based just on the lack of the desired policy outcome, political disadvantage explanations stress the structural limitations systematically affecting the capacity of certain social groups to access and participate in the policy process. In this view, political disadvantage is not conceived just as a circumstantial consequence of ordinary democratic politics, in which today's "losers" might be tomorrow's "winners" and vice-versa. Rather, it is a result of structural patterns of the social and political dynamics of a polity. The famous footnote four of the US Supreme Court decision in Carolene Products is a good example of this view of litigation and the role of courts, as a way to guarantee the openness of the political process to "discrete and insular minorities".[16] The use of the courts by the civil rights movement in the US during the 1940s and 50s is usually cited as the paradigmatic historical example of this argument. Due to entrenched discriminatory institutions and open social intimidation, most political channels were closed to African-Americans in the South of the US. In that historical context, for many actors in the movement such as the NAACP, litigation appeared as the only viable institutional channel for promoting civil rights policies (Olson 1990). Criminal defendants and prisoners is another often cited concrete example of social groups suffering a structural political weakness to access and influence the political system in a democracy (Wilson and Rodriguez Cordero 2006). For this type of groups, litigation might be the main or even the only institutional resort available to protect and promote their interest.

Despite its analytical strengths, this traditional view of politically disadvantaged groups as resulting from structural obstacles to access the political system has a relatively

[16] Although, it is worth pointing out, that the footnote specifically refers to the use of judicial review power ("United States v. Carolene Products Co." 1938, 304 US 144, 152 n.4).

narrow empirical coverage. This view is largely based on the historical experiences of social groups suffering institutional discrimination or even political persecution, and therefore the type of cases it can explain rather specific and limited. Therefore, we expand the scope of applicability of the politically disadvantaged explanation by including arguments that point out that political disadvantages may also derive from structural and enduring problems of collective action (M. Olson 1965). Indeed, this is a systematic problem faced by social actors pursuing policies that promote diffuse interests;[17] that is, goals and interests that benefit broad and general sectors of society, such as many types of consumer or environmental protection legislation (Wilson 1995; Handler 1978; Beyers 2004).[18] In these cases, the (individual) costs of engaging in political activity tend to be high, while any potential benefits deriving from it are likely to be widely distributed among a diffuse constituency, which results in a lack of incentive for organized, massive political action. By contrast, the specific interest groups or sectors bearing the costs of these policies have strong incentives to organize themselves and influence the policy process (J. Wilson 1995).

In these contexts, litigation becomes a way to overcome the structural organizational disadvantage for political mobilization affecting diffuse constituencies. It allows active social actors to promote policies benefiting diffuse interests, without the need for mobilizing vast resources or coordinating large collective actions, which are

---

17 These types of interests are also commonly labeled as "public interest" by many social activists and academics. However, following Beyer (2004, 236), I prefer the term diffuse to public interest because it better captures the diffuseness or fragmented nature of the involved social constituencies or sectors, which is precisely the main point of this argument. Moreover, it avoids the normative debate about what should be considered a "public interest".

18 Following J. Wilson (1995, 331-332), it is important to conceptually differentiate diffuse interest (or in Wilson's terminology, distributed policy benefits) from the economists' notion of collective goods: *"...widely distributed benefits may or may not be what economists call a collective goods –that is, something from the enjoyment of which no one can feasibly be excluded. All collective goods such as national defense, are a widely distributed benefit, but not all widely distributed benefits, such as social security payments, are collective goods."*

generally deemed necessary to successfully influence representative political institutions. Of course, one can reasonably argue that policy litigation can often be a lengthy and costly process (see, for instance, Epp 1998). However, depending on the characteristics of the involved groups and the institutional contexts, judicializing a policy dispute can be comparatively easier and less resource-demanding than trying to influence the legislature or the executive. Wilson and Rodriguez Cordero's (2006) analysis of the case of legal mobilization of people living with Aids (PLWA) in Costa Rica is a good example of this argument. Because of the fear of the social consequences, PLWA in Costa Rica tended to keep their identities in secret and did not openly become involved in advocacy actions aiming to change public policy. At the same time, legal rules allowed for open and easy access to the courts at a low cost. In this context, it should not be surprising that groups promoting PLWA interests prioritized the use of the courts to pursue their policy goals over lobbying congress or executive agencies.

Another way in which judicialization helps social groups to overcome their structural weakness for political mobilization is that once a policy claim is admitted in a court of law, the government is required to provide an official and formal response. In other words, the government has to take a position on an issue and to publicly justify its action or inaction (Peruzzotti and Smulovitz 2002). This is not necessarily the case when social groups make policy demands to an executive agency or submit a bill in congress, where policymakers can simply ignore their claims or proposals. In fact, this lack of response is very likely to occur when the involved social actors do not have enough political leverage to engage state actors in policy negotiations or exchanges. Clearly, this makes judicialization even more appealing for politically disadvantaged social actors.

In sum, the political disadvantage explanation stresses that policy judicialization is driven by the structural difficulties facing certain societal groups to influence policy

developments as a result of the limited access to the policy processes or because of endogenous problems of collective action, or a combination of both.

In its turn, the political fragmentation explanation stresses the role played by majoritarian decision-making institutions in the judicialization of policy issues. Among this literature, the typical argument is that political fragmentation often leads to policy litigation (Clayton 1992; Tate 1995; Edelman 1995; Ferejohn 2002; Whittington 2005). When governments are unable to produce policies because of the lack of disciplined political parties or effective legislative majorities, it is more likely that policy conflicts will be brought to the courts as a way to overcome political deadlocks and stalemate. The paradigmatic example of political fragmentation is divided government, where the executive and the legislative branches of government are controlled by distinct parties or political coalitions. However, fragmentation can also arise when a majority party controls both political branches but that majority is ideologically heterogeneous or party discipline is very low (Chavez et al. 2011). In any case, the distinguishing feature of all these scenarios is that political fragmentation limits the capability of congress to legislate or to be the place where policy is effectively formulated. In these contexts, it is reasonable to expect that certain actors will turn to the courts for policy responses to issues that elected policymaking institutions are unable to address and resolve. The judicialization of the legislative reapportionment issue in the US during the 1960s is considered to be an example of this type of dynamics. Whittington (2005) argues that the Kennedy administration through the Justice Department "encouraged" the Supreme Court to address this issue in Baker v. Carr (1962), because there were insuperable obstacles to any significant action in the legislative sphere. Similarly, Clayton (1992, 2002) argues that the judicialization of civil rights policies during the Truman, Eisenhower and

Kennedy administrations occurred in a context in which democratic policymaking - at the federal level - was blocked by an electoral system that allowed a minority, Southern Democrats, to thwart any possibility of legislative reform in this matter. In the context of parliamentary democracies, Edelman (1995) makes a similar argument in relation to Israel; he argues that the increased judicialization of Israeli politics during the 1980s and 1990s was a result of the inability of its elected institutions to address and resolve important political and policy disputes due to increasing partisanship and lack of strong parliamentary coalitions. In short, according to this argument, situations of divided government or fragmented legislature are likely to trigger the judicialization of policy issues because the ability of the elected branches of government to act in concert and advance policies is very limited.

The political disadvantage and political fragmentation explanations clearly go beyond the policy loser argument in their attempt to elucidate the sources of the phenomenon of judicialization. Both explanations identify specific political conditions or features that trigger the involvement of courts in public policy. In that way, they provide elements to understand how the ways in which a democratic polity works can lead to the judicialization of policy processes. However, both of these theories have a limited empirical coverage. Political fragmentation, in particular, does not seem to be a relevant factor to explain the role of legislatures in triggering the judicialization of policy in Latin America. Empirical studies on legislative assemblies do not show many instances of policy deadlock or divided government dynamics in the region (Munck 2004a) nor in Argentina specifically (Mustapic 2002). This is also reflected in my research. As I will show in the empirical chapters, legislative stalemates were not a factor in the judicialization of the public policies examined in this study. Indeed, most of these policy

conflicts occurred in political contexts that could hardly be considered fragmented, and in which the involved governments had policy making majorities or were potentially able to garner the legislative support they needed.

Similarly, most studies based on either of these two explanations (the inability of the certain social actors to access to political system, or the fragmentation of the legislative power) usually refer to disputes in which actors were advocating legislative changes. However, the involvement of the courts in policy processes and issues is many times related to disputes regarding the implementation or enforcement of existing legislation. As argued by Brinks and Gauri (2008), judicialization tends to follow legislation. In these contexts, neither explanations based on the lack of political leverage of the actors involved nor those focusing on legislative deadlock, seems to provide a convincing account of the political conditions triggering the judicialization of policy disputes. If the social groups are demanding policy goals or measures that were already approved through the democratic decision making process, how can it be claimed that the legislatures have been ineffective? Similarly, to what extent judicialization can be the result of the lack of access of politically disadvantaged groups to the policymaking process if their policy goals are already part of the existing normative and policy framework?

In sum, both of these theoretical explanations made an important contribution by identifying some of the key political conditions triggering processes of policy judicialization. However, these explanations have a limited empirical coverage; and as this study shows in the case of Argentina, they are able to account for certain types of processes of judicialization, but not for others.

TOWARDS A THEORY ON THE POLITICAL SOURCES OF JUDICIALIZATION

Drawing on the limitations and contributions of the previous explanations and also based on the insights gained from my empirical research, the theoretical core of this dissertation is built upon the idea that, instead of a single, general explanatory factor, there are several, different political conditions or combinations of conditions that trigger the involvement of courts in policy issues. In other words, there is not just one, but various, alternative political scenarios which are likely to drive the judicialization of public policy.

One way to address and frame this assumption of equifinality is through typological theorizing. Such kind of theoretical approach provides a way of modeling contingent causal explanations of a given phenomenon, and to draw together existing research in one framework. In contrast to a general explanatory theory, a typological theory seeks to identify the various and alternative types of configurations or combinations of causal conditions that are linked to the outcome under investigation (George and Bennett 2004). A first step in building a typological theory is to identify the initial list of possible independent variables or causal conditions. Partly based on the analysis and, in some cases, reformulation of existing theoretical explanations discussed above (namely, the policy loser, the politically disadvantaged groups and the political fragmentation argument), and partly based on the empirical analysis of the cases covered by the study, I identified five distinct yet interactive conditions that I consider are the critical sources triggering the judicialization of public policy disputes. These conditions are: a strict formulation of the policy loser argument (below, I develop the rationale for this concept in detail), the political leverage of the actors posing policy claims to the state (which is based on the findings and contributions made by the political disadvantage arguments already discussed above), the role of the legislature and the role of the

executive branch of government (both critical factors to understand why actors would decide to turn to the courts instead of pursuing their policy goals through the elected policymaking venues), and the capability of the state apparatus (a key element that affects to what extent the policies commitments expressed in the legislation are realized in practice). These conditions, either individually or in combination, constitute the main political factors that drive the demand for judicial intervention in public policy disputes.

It is not the purpose of this dissertation to develop a fully specified typological theory of judicialization based on these five conditions. Such an endeavour implies to provide hypotheses on all the mathematically possible combinations of these five conditions in relation to the outcome under study. However, as George and Bennett explained (2004, 235), it is entirely reasonable for a research project to focus on certain types of configurations, either because they are the more common causal paths or have relevant theoretical or empirical implications.

Within this conceptual framework, then, this study focuses on two specific configurations leading to the judicializacion of public policy which have not been examined, and cannot be accounted for, by the existing theoretical explanations discussed in the previous section. These two combinations of political conditions can loosely be characterized as weak rule of law scenarios (or *"estado de derecho"* or "*état de droit"* as it is called in countries of the civil law tradition). In these political contexts, the policy goals and measures demanded by social actors are already part of the existing regulatory and legislative framework, but these goals and mandates are not realized in practice because either the state apparatus is unable to implement or enforce these policies (the state deficiency scenario) or the political elites in charge of the executive do not fully support those existing policy mandates and rules, and the legislature is too passive and deferential towards the executive (the weak horizontal accountability scenario). When

facing these political contexts, social actors are likely to turn to the courts to pursue their policy claims and demands.

These two scenarios constitute two alternative, different paths to the judicialization of public policy. However, in order to analyze these configurations and explain why and how they trigger processes of policy judicialization, we need first to revisit the policy loser argument.

Strict formulation of the policy loser argument: A building block

Above, I have strongly pointed out the limitations and problems of the conventional notion of the policy loser as a general explanatory theory of the phenomenon of policy judicialization. However a more strict formulation of who is a policy loser and what does it mean, constitute a key building block to account for the different political scenarios in which policy judicialization occurs.

In many cases, it is quite simple to identify when a social actor is a loser of a policymaking process (for instance, when the legislature approves a bill that the involved social groups are opposed to), and when a group is not a loser (the opposite example: when the legislature rejects the same bill). The more complex situations are those in which the policy demands of the social groups are based on policy mandates established by existing legislation but the government is unresponsive to or ignores the demands of the social actors. According to the standard policy loser notion, these actors would be considered losers of the policy process because they did not obtain from the state what they were demanding. However, such assessment implicitly subsumes the notion of policy loser into that of government unresponsiveness. As a result, it does not have much analytical utility to explain processes of policy judicialization. As mentioned above, in a judicialized policy dispute, always there is a party whose demands or claims have not

been met by the state, otherwise, there would be no reason to bring a lawsuit in the first place.

In contrast, a more restricted understanding of the notion of policy loser allows for differentiating between two situations leading to policy judicialization: on the one hand, the lack of favourable government response to social demands for new legislation (or to social opposition against new policies promoted by the government), and on the other hand, the lack of positive government response to demands regarding the implementation of existing legislation and policies. In the former situation, the groups that unsuccessfully claimed for or against new legislation are clear losers of the democratic policymaking process. For instance, in the case of Brazil, the use of the *"ação direta de inconstitutionalidade"* by opposition parties and other actors, such as trade union confederations, provides a good example of this dynamic. Once they lose in the legislative arena, these actors often resort to the high court (specifically, the Supreme Federal Tribunal) in an attempt to defeat the government's proposals in the judicial arena (Taylor 2004; Arantes 2005; Taylor 2008). On the contrary, in the latter situation described above, the social groups are not entirely losers of the policy process; they are demanding the implementation or enforcement of policy measures that were favourably approved by the elected branches of government in the first place, and which are already part of the existing normative framework. Clearly, these are two completely different types of political scenarios that might lead to the judicialization of a policy issue.

A critical issue when making this distinction (and which speaks to the general validity of this argument) is how sound is this notion of social actors making policy demands based on the lack of implementation or enforcement of existing legislation. Legal norms (and here I am using these terms in a generic way, to refer to any type of legal norm, from constitutional to mere administrative norms) are often undetermined,

vague and can be object of different reasonable interpretations. Many times, legal provisions contain broad policy goals or aspirations without establishing clear and concrete measures to achieve them. Political actors often attempt to advance their policy agendas by expanding or constraining the meaning of already existing legal norms. Given, then, that the meaning of the law is often object of contention, until what point is it possible to argue that an actor is just demanding the implementation or enforcement of a particular legislation? How can we determine that?

To a certain extent, this is basically an empirical issue, and in the following chapter (chapter 3), I develop basic criteria for assessing the policy demands made by social actors in relation to the existing normative framework, which ultimately allows me to determine whether an actor should be considered a loser of the policy process or not. At this stage, however, it is worth clarifying that policy demands based on alleged infringement of broad constitutional commitments are not considered as a situation of lack of enforcement or implementation for the purpose of this study. This type of aspirational legal norms generally allows for a wide margin of potential policy responses, and it is therefore up to the political branches of governments to define the specific policies to be taken.[19] Claims for lack of implementation, on the contrary, have to be based on clear and concrete policy mandates established by laws passed by the legislature, regulations issued by the executive or very specific and directly applicable constitutional provisions. Only in these cases, it is conceptually and empirically sound to argue that a group judicializing their policy claims, has not been a loser of the policymaking process.

In sum, a strict formulation of the notion of policy loser provides a key building block that allows for distinguishing between two different, general types of political

[19] Although, it is important to stress this is not an argument against the justiciability of constitutional rights, particularly socio-economic rights. In the next chapter, I address this issue with some more detail.

scenarios in which policy issues might become judicialized. In the first one, policy litigation is linked to actors and groups that unsuccessfully claimed for new legislation/policies or against new legislation/policies promoted by government. This is the typical case of the losers of the democratic policymaking process triggering the judicialization of public policy. In the second scenario, instead, judicialization is linked to social demands made by actors that are not strict losers of the policy process, because they are demanding the application of measures that were already approved by the political branches of government. This is a key analytical and empirical distinction. However, as mentioned above, the loser argument by itself cannot take us any further. It cannot give us insights about how a democratic polity works, or why actors that are not policy losers turn to the courts to pursue their policy goals. Clearly, it requires to be combined with other conditions in order to provide a more complete political account of the phenomenon of policy judicialization.

Based on this conceptual and empirical distinction between the strict losers of the policymaking process, and those who demand the implementation/enforcement of existing legislation, we are ready to analyze under what political conditions these actors that are not policy losers are likely to turn to the courts to pursue their policy goals. In that regard, and as mentioned above, I identify two main alternative scenarios under which policy judicialization might occur. I have labelled them as the weak horizontal accountability and the state deficiencies scenarios.

Weak Horizontal Accountability

My first explanation of the judicialization of policy disputes focuses on the role of the political elites in charge of the government and the weakness of the mechanism of checks and balances between the executive and the legislature. In this account,

judicialization is likely to occur in situations in which politicians in charge of the executive do not wholly support the implementation and enforcement of laws and policies already in force. This is the typical "lack of political will" argument, very common among rights activists and political observers in Latin America. Moreover, in this type of cases, weak or lack of policy implementation results from politicians' preferences which differ from the existing legislation.[20] There may be different circumstances (electoral or reputational costs, international pressures, etc.) explaining why political elites would not openly attempt to modify existing policies and normative frameworks so they are in line with their policy preferences. Whatever the reasons might be, the relevant point here is that political elites decide not to fully uphold the rule of law, forcing interpretations of existing legislation and constitutional provisions so as to fit their real policy preferences, or many times just ignoring these rules altogether.

Moreover, this discretionary exercise of power by the political elites in charge of the executive government is often aided and abetted by a passive and deferential legislature, which does not fully exercise its monitoring functions and oversight powers, allowing the executive to interpret and apply existing laws and policies as it pleases. By passive, I am referring to a legislature that does not shape or modify policies defined by the executive, nor does it control how policies are implemented (or not) by the executive. This type of legislature clearly contradicts a main premise of representative and liberal democracy, in which legislative assemblies are conceived as a main arena for policy deliberation and interest aggregation in democratic politics, as well as a main component of the system of check and balances, overseeing the implementation of policies by executive branch officials and agencies. To a certain extent, this notion of "passive

[20] In similar, but rather more holistic terms, Brinks and Gauri (2008) speak of situations of "incomplete commitments", in which universalistic policy goals expressed in constitutional and legislative commitments are in dissonance with the particularistic and clientelist exchanges used by political elites to maintain the extant political order.

legislature" fits with a widespread perception among certain political observers and academics that legislatures in Latin America tend to play a rather subordinate role, often being bypassed by or even abdicating powers in favour of the executive. O'Donnell's well known description of many Latin American polities as "delegative democracies" (1994) is a paradigmatic example of this view.[21]

A critical issue in this conceptualization of passive legislatures is how to consider situations in which the government has legislative majorities. Is a legislature supportive of the executive a passive legislature? Governments regularly seek to garner legislative majorities supporting their policy initiatives and positions and this is part of the normal dynamic of majoritarian decision-making institutions. However, as mentioned above, the work of congress also entails policy deliberation and negotiation as well as overseeing and monitoring the executive. The focus here, then, is not only on whether the legislative assembly supported the government in a particular policy dispute, but also on how the legislature inserted itself into the policy process. In this view, then, a legislative majority aligned with the executive can be considered as passive when the legislature approves executive policies without engaging in policy negotiations, or when the legislators aligned with the government block congress initiatives to monitor and control the government's exercise of executive powers.

In sum, this explanation depicts a political scenario in which the executive applies and enforces existing legislation and regulations as it pleases, and the legislature is passive and does not monitor the discretionary exercise of executive power. Facing this type of political scenario, my research shows that social actors turn to the courts to demand the implementation of existing policies and the government's compliance with

[21] In contrast, some more recent works on Latin American legislatures argue that they are not as deferential and subordinate to the executive as it is generally believed (Cox and Morgenstern 2002; Morgenstern and Nacif 2002).

existing laws. It is worth noting that these social groups are not strict losers of the policy process. Basically, they are demanding the government fulfill or enforce relatively concrete policy commitments or mandates that were taken and approved by the elected branches of government, but which are not realized in practice by the state. Ironically, in this type of cases, it is a weak rule of law what drives the judicialization of public policy.

This scenario, however, seems to contradict a predominant view within the judicial politics literature that argues that when political power is not disseminated or there is a single dominant party or political coalition, courts tend to be more deferential to the political branches of government and less likely to confront governmental policies (Ferejohn 2002; Ginsburg 2003; Chavez 2004; Chavez et al. 2011), which logically tends to reduce the attractiveness of policy litigation. According to this view, then, judicialization is less likely to occur in situations of unified government because the courts are less likely to act against the government. I do not contend the argument that the political context can affect (and does affect) judicial behaviour. There is a large body of empirical research supporting that claim. However, as stated by Clayton (2002), this argument only truly captures the supply - side of the phenomenon of judicialization. It does not tell us much about the demand - side for judicial intervention in public policy, which is precisely the focus of this study. Obviously, lawyers and actors assess the potential judicial responses and their chances of winning or not before filing claims to the courts. However, as several of my case studies show, social actors do judicialize their policy claims in political systems characterized by unified governments or the presence of a relatively dominant political coalition (even if judicialization might be less frequent than in contexts of more competitive political systems).[22] Arguably, for the actors

[22]It is worth noting that even if we are referring to cases of unified government or dominant political coalitions, we are working under the assumption that there is a relative level of judicial independence. If a particular case is lacking even that minimum level of judicial independence, then it is clearly outside the

involved in these disputes, courts and judicial procedures might represent the last or even the only institutional resort available to pursue their policy goals. The interesting issue from a quality of democracy point of view, is that these actors do not turn to the court after losing in the majoritarian policymaking venues or because the legislative process is in deadlock and cannot produce policy, but because the government is not fulfilling existing policy commitments. In short, in contrast to the predominant theoretical expectation that policy judicialization is less likely to occur in scenarios of unified government, my research shows that social actors judicialize their claims regarding the enforcement or implementation of existing policies even in contexts in which the political party or coalition in charge of the executive also controls the legislative branch of government.

State Deficiencies

This explanation of the phenomenon of judicialization focuses on problems of state capacity as a main factor triggering the judicialization of policy disputes. This occurs when explicit policy goals and mandates established by the existing legislation are not fully implemented because the state apparatus lacks organizational/institutional resources and capabilities, or these resources and capabilities are poorly managed and exercised. In other words, the legislature and the executive approve and establish programs and policies, but these are only weakly implemented or enforced due to deficiencies in the organization and capacity of the state.

Problems of state capacity encompass a variety of situations that can affect and hinder bureaucratic implementation and enforcement, ranging from lack of appropriated

---

scope of applicability of our argument, because one of the necessary, enabling conditions for judicialization, is missing (for a discussion on the scope conditions, see the first part of this chapter).

resources to problems of policy coordination. For instance, Hoffmann and Bentes (2008) describe how the judicialization of health policy in Brazil is many times related to informational failings of the public health care system to be updated with the state of medical art, or to logistical problems in delivering and making a medicine available to the public in time and sufficient quantity. More generally, Kagan (2001) argues that the process of policy judicialization in the USA (what he called "adversarial legalism") is basically the result of a fragmented and bureaucratically weak state which is unable to respond to rising social demands for government protection. Policy advocates, then, seek to "legalize" their policy goals in detailed substantive and procedural rules and to enforce them through the courts. In short, as these examples suggest, judicialization occurs in situations in which policy goals and mandates, approved and established by the political bodies of government, outpace the capabilities and the performance of the state in implementing and enforcing them. Moreover, the social actors bringing claims to the courts in this type of scenarios are not strict losers of the policy process; these are groups favoured by legislation approved by the political branches. However, given the systematic lack of effective and proper implementation of these policies, these actors turn to the courts and judicialize their claims.

A main issue in this type of scenario is to empirically distinguish weak enforcement due to state deficiencies, from that resulting from politicians' preferences. This raises methodological as well as conceptual challengers. As explained by Munck (2004a), there is a complex interplay between politicians' preferences and state capacity to implement policy. Sometimes politicians cannot uphold the rule of law due to a lack of state capacity, other times they do not intend to apply the law, and just invoke a lack of state capacity to cover their real preferences. How can we differentiate them? In conceptual terms, my argument about state deficiencies refers to more enduring features

of the bureaucratic capability to carry out its implementation and enforcement tasks. These are features that are usually the result of medium or long term processes and which, therefore, are not easily changed by short term variations in politicians' preferences. The political will argument, on the other hand, refers to decisions and actions taken by the politicians in charge of government during a particular period under analysis. Undoubtedly, many of these decisions may negatively affect the ability of the state to implement certain legislation in the short run (for example, changes in the budget of an agency) but for the same reasons, they can be relatively easily undone by a future government. More significantly, as some of the cases covered by this study will show, even when the political elites in charge of the government are relatively supportive of the policy in question, state deficiencies can still lead to the judicialization of a public policy. In sum, although both of these conditions (the "lack of political will" and state deficiencies) affect the proper enforcement or implementation of existing policies, they constitute two substantially different and alternative types of political scenarios under which policy judicialization is likely to occur.

SUMMARY

The purpose of the dissertation is to examine whether there are certain patterns in the way a democratic polity works that lead to the judicialization of public policy. This chapter shows that the most widespread explanation in the literature, the loser argument, does not provide a sound response to this question. This argument is too general and does not provide much analytical insight about relationship between the political context and the judicialization of policy. Meanwhile, other explanations developed by the specialized literature, mainly the politically disadvantaged group and the fragmented legislative

power, although theoretically valid, have a limited empirical coverage and cannot fully explain the phenomenon of policy judicialization in Argentina.

Accordingly, taking into account the limitation of the existing explanations but also building upon their contributions, this dissertation makes two main claims. First, it argues that there are various, alternative political scenarios under which the judicialization of public policy is likely to occur. In other words, there is not just one, but several, different political conditions or combinations of conditions that might trigger the involvement of courts in policy processes. Second, and within this conceptual framework, the study argues that public policy is likely to become judicialized under two political scenarios which have not been fully considered by the existing literature: in the first one, judicialization occurs because the state apparatus is unable to implement or enforce policy goals and mandates already approved by the political branches of government; in the second scenario, social actors turn to the courts because the political elites in charge of the executive do not fully support existing policy mandates and rules, and the legislature is too passive or deferential to the government regarding that policy issue. In both of these political scenarios, the social actors bringing claims to the courts are not losers of the policy process; they are demanding the fulfillment of policy mandates and commitments already made by the elected branches of government, but which are not fully or properly realized in practice.

In order to assess these arguments, in the following chapter I develop a qualitative comparative analysis (QCA) of 13 major policy disputes that occurred in Argentina during the last couple of decades.

CHAPTER 3: ONE OUTCOME, SEVERAL CAUSAL PATHS

As mentioned in previous chapters, this dissertation basically claims that the judicialization of public policy does not occur in political vacuums. On the contrary, this study argues there are certain regularities, certain patterns in the political contexts which lead to the judicialization of policy issues. In other words, there are certain types of combinations of political conditions, what I label political scenarios, which are likely to trigger policy judicialization. Moreover, the dissertation also argues that no political condition or factor provides a catch- all explanation of this phenomenon. As discussed in the previous chapter, existing explanations focusing on the political leverage of the involved social groups or in the role of the legislature can account for certain types of processes of policy judicialization, but not for others. Accordingly, the study claims that there are several alternative political scenarios offering sufficient basis for the judicialization of public policy. Within this conceptual framework, then, the dissertation argues that judicialization is likely to occur in scenarios of discretionary exercise of executive power and weak legislative oversight, and in political contexts characterized by a deficient state apparatus, unable to implement or enforce policies commitments already made by the political branches of government.

To assess this argument, this chapter develops a qualitative comparative analysis (QCA) of 13 major policy disputes that occurred in Argentina during the last two decades. QCA is a very suitable methodological approach for this study because is based on a conception of causality as conjunctural and heterogeneous (Ragin 1987, 2000). Thus, QCA allows me to identify and to assess whether there are different alternative political scenarios under which public policy might become judicialized. Moreover, it allows for defining and appraising these political scenarios in terms of combinations of

conditions. Therefore, instead of isolating and estimating the causal weight of each political variable against the others, the analytical focus of this methodology allows for examining how political conditions combine and whether those combinations are linked to the outcome.

The chapter is organized in the following way. First, given that the qualitative comparative analysis is based on the use of fuzzy set (fsQCA), it provides a brief explanation of this technique; second, it describes how I build the fuzzy set for the outcome and the fuzzy sets for the different causal conditions; third, it develops the fsQCA analysis; fourth, it concludes with an interpretation of the QCA results.

QCA USING FUZZY SETS

As mentioned above, this qualitative comparative analysis is based on "fuzzy" sets (fsQCA). This technique allows for assessing variation in the outcome and causal conditions by degree. In contrast to conventional, dichotomous sets (in which a case is either "in" or "out"), fuzzy set analysis permits partial membership of a case in a category.[23] Thus, for instance, instead of just characterizing a group as politically disadvantaged or not, the use of fuzzy sets allows for assigning a score, indicating the degree to which a group belongs to this category. Clearly, this allows for a much more fine – grained analysis of the evidence and, at the same time, it demands a more detailed knowledge of the cases. Furthermore, it requires researchers to be very explicit and specific in the conceptualization and operationalization of the qualitative breakpoints or anchors in the set, all of which clearly increases the transparency of the qualitative analysis.

[23] For a detailed discussion and analysis of the concept of fuzzy set in qualitative research, see Ragin (2000, chapter 6).

In this study, I use a four-value fuzzy set (0; .33; .67; 1) to assess variations in the outcome and the causal conditions. Each value in the set expresses a qualitative breakpoint or anchor in the interval 0 to 1. In other words, each value conveys a qualitative criterion, based on theoretical reasons and substantive knowledge. I choose to use a four-value fuzzy set and not other more fine-grained fuzzy sets, because a four-value scheme is especially useful for studies like this one, in which there is a substantial amount of information gathered about the cases, but the nature of the evidence is not always identical across cases (Ragin 2009). In a four-value scheme, there are two clear and easily differentiated qualitative states: full membership in a set (1) and full non-membership (0); and there are two other states in which the data might not be definitive but it strongly suggests that a case is "more in than out" of a set (.67), or inversely, that a case is "more out than in" a set (.33). In this regard, It is worth stressing the difficulties in identifying and developing the empirical criteria for each of the breakpoints in the fuzzy sets when the nature of the data is not identical across the cases. As words can take on different meaning when used in different contexts, indicators can also measure different things in different contexts (Munck 2004b). Moreover, not all pieces of evidence count equally. Certain observations may be a "smoking gun" in certain contexts, contributing substantially to a researcher's assessment about the causal weight of a condition (Mahoney and Goertz 2006). Therefore, in many of the fuzzy sets, the description of the empirical criteria justifying the qualitative breakpoints encompasses several different indicators or pieces of evidence. Sometimes these different indicators work jointly in helping make an assessment about the degree of membership of a case in a category; in other cases, the presence of one piece of evidence is enough to make an assessment. In sum, all of this outlines that the assessment of memberships in a fuzzy set,

especially in the case of a four-value scheme, is basically an interpretative act and should not be conceived or understood as a mechanical operation.

DEFINING JUDICIALIZATION AS A FUZZY SET

While it is clear that some policy conflicts are judicialized and others are not, the degree of involvement of the courts in a policy dispute can vary significantly. These variations speak to the different level of relevance that judicial procedures might have in the unfolding of a particular policy process and debate. Table 3.1 describes the four-value fuzzy set I created to assess the level of judicialization, and includes a brief formulation of the criterion that justifies each value.

Table 3.1: Policy Judicialization Fuzzy Set

1 = Fully in. **The policy process is clearly judicialized**	The judiciary is the main institutional arena where the policy debate takes place. Social actors focus their advocacy efforts on the judicial process.
.67 = More in than out. **The policy process is more than less judicialized**	The policy discussion occurs in several institutional venues simultaneously, including the judiciary (for instance, legislature, regulatory agencies, etc.). Social actors distribute their lobby and advocacy efforts between the different policy-making venues involved.
.33 = more out than in. **The policy process is less than more judicialized**	Legal claims were filed to and admitted by the courts, but the development of the judicial process follows the unfolding of policy negotiations taking place in other venues. Social actors and policy actors stress these venues over the courts.
0 = fully out. **The policy process is clearly not judicialized**	There have been no legal claims filed to and admitted by the courts.

From a quick reading of Table 3.1, it seems quite obvious when policy conflicts are judicialized and when they clearly are not. The critical point in the set refers to certain types of policy disputes, in which legal claims are brought to and admitted by the courts, but the judicial procedures play a clearly secondary role, or no role at all, in the development of the policy process. In this type of cases, although there are legal claims filed at the courts, other central requisites to consider these policy processes judicialized are missing. The judiciary is not "displacing" the executive and/or the legislature in the policymaking process (Tate and Vallinder 1995), nor "adding" another main venue for policy negotiation and debate (Gauri and Brinks 2008). Accordingly, this type of disputes is considered "less than more" judicialized. In short, these are disputes with weak membership in the set policy judicialization.

DEFINING CAUSAL CONDITIONS AS FUZZY SETS

I also created a four-value fuzzy set for the five political conditions theorized in the previous chapter as potential triggers of the judicialization of public policy. These conditions are: strict loser of the policy process, social groups with low political leverage, passive legislature, executive opposition and deficient state capacity. It is worth stressing that although these factors or conditions are based on the theoretical explanations discussed in chapter 2, the construction of these fuzzy sets was hardly an exclusively deductive exercise. Instead, they were the result of an intense dialogue between the relevant theoretical arguments and the empirical evidence. The knowledge of the cases and their contexts provided insights that help conceptualize and operationalize the theory-based conditions in ways that they could become relevant and applicable to the cases under study. Accordingly, each breakpoint or anchor in the fuzzy sets (0; .33; .67; .1) reflects a criterion based on substantive and theoretical knowledge. Following, I describe

and explain the fuzzy set for each of the causal conditions that might trigger the judicialization of policy.

The first fuzzy set refers to the strict "policy loser" argument (Table 3.2). Basically, it assesses whether the involved social groups have been able to obtain their policy goals through the traditional political branches of government, the legislature and/or the executive. As mentioned in the previous chapter, it is quite straightforward to identify when a social group is a loser of a policymaking process (for instance, when the legislature approves a bill that the involved social groups is opposed to), and when it is not (the opposite example: when the legislature rejects that bill). The critical breakpoint in this set refers to situations in which the policy demands of the social groups refer to concrete policy mandates established by existing legislation or regulations but the state is unresponsive to the demands of the social actors. In these cases, we consider the involved social groups as *"more out than in"* the set of policy losers (in other words, they are not strict policy losers), because the policy goals or measures they are demanding were already approved by the political branches of government.[24]

The challenging issue in this type of situations is to determine whether an actor's policy demands are based on concrete existing norms and policies or not. As mentioned above, legal rules can often be quite undetermined and object of different and sometimes contrasting interpretations. Moreover, political actors many times attempt to advance their policy agendas by expanding or constraining the meaning of already existing legal norms, especially constitutional provisions. Take, for instance, a hypothetical situation in which certain social actors unsuccessfully demanded and lobbied the government to

[24] As explained in the previous chapter, two main reasons justify the strict formulation of the policy loser argument. First, the standard notion of policy loser is extremely general, and therefore, does not have much analytical utility to explain the political scenarios under which policy judicialization occurs. Second, a more strict formulation of the policy loser argument allows for distinguishing between the lack of favourable government response to social actors' demands regarding the making of new legislation and policies (a strict policy loser case) from those demands regarding the implementation of existing ones.

establish a particular health care policy, and those actors based their demands on constitutional provisions that recognize a right to health. How should these social actors be considered? Are they strict losers of the policy process because the government was unresponsive to their demands, or are they demanding the government fulfillment of existing policy mandates? As a general criterion, this study considers that claims for lack of implementation or enforcement have to be based on concrete policy mandates established by laws passed by the legislature, regulations issued by the executive or very specific and directly applicable constitutional provisions. Only in these cases, it is conceptually and empirically sound to argue that a group has not been a loser of the policymaking process. On the contrary, if a government is unresponsive or opposed to certain policy demands based on relatively broad constitutional commitments or aspirations, the actors posing those demands on the state are regarded as losers of the policy process for the purpose of this study. This assessment is justified by the fact that this type of aspirational legal norms generally allows for a wide margin of potential policy responses; it is therefore up to the political branches of governments to define the specific policies to be taken.

As a final note, however, it is important to stress that the distinction made above between concrete legal mandates and broad constitutional provisions, does not constitute an argument against the justiciability of constitutional rights, particularly socio–economic rights.[25] The purpose of this distinction is to help us make an assessment about the *political status* of social actors making claims to the state; that is, are these actors policy losers or not? Hence, this distinction should not be construed as implying an assessment of the legal merits of right–based claims, or for that matter, of the general legal arguments made by the different actors involved in a policy dispute.

[25] For an analysis of the arguments justifying the justiciability of socio economic rights see, for instance, Abramovich and Courtis (2002; 2006). For arguments against, see Cross (2001).

Table 3.2: Strict Policy Loser Fuzzy Set

1 = Fully in. **The actors are clearly strict losers of the policymaking process**	The legislature passes laws that the social actors are opposed to. Alternatively, the legislature rejects bills supported by the social actors
.67 = More in than out. **The actors are more than less strict losers of the policymaking process**	The executive takes administrative/regulatory measures opposed by the social actors, or it does not take measures claimed by the actors. These executive actions or inactions do not openly contradict existing legislation or they are based on reasonable interpretations of existing legislation (to make this assessment I take into account –when possible- how the courts have assessed the government's legal arguments: If several courts ruled against the government, I consider that the government interpretation was not reasonable. In contrast, if some courts ruled against the government, but other ruled in its favor, I consider that the government interpretation was reasonable).
.33 = more out than in. **The actors are less than more strict losers of the policymaking process**	The executive takes measures opposed by social actors or it does not take measures demanded by social actors to implement/enforce relatively clear and concrete existing laws and policies. These executive's actions or inactions contradict existing legislation or are based on discretionary interpretations of existing legislation (to make this assessment, I use the same indicators and evidence described above). Or the executive does not openly deny that the social demands are based on existing policy and legal mandates, or even acknowledges that the social demands are based on existing laws and policies.
0 = fully out. **The actors are clearly not strict losers of the policymaking process**	The legislature/executive rejects policies the social actors are opposed to. Alternatively, the legislature/executive approves policies supported by the social actors.

The weak political leverage fuzzy set (Table 3.3) speaks to the political disadvantage arguments discussed in chapter 2. This set assesses social actors' access to the policy process and capability to influence the policy negotiations. The purpose is not

to evaluate whether these actors effectively get the policy results they pursue, but the extent to which their policy claims and positions are part of the policy debates and policymaking processes.

The qualitative breakpoints of this fuzzy set combine two types of elements. On the one hand, pieces of evidence that refer to the level of access that the social actors have to the policy process and policymakers (for instance, participation in committees or advisory boards, meetings with policymakers, access to inside information, etc.). On the other, elements that speak to the level of social mobilization and the strength of the actors' support structure for political action (for instance, whether there were street mobilizations or other type of massive protests; whether actors were able to reach and mobilize broader constituencies; whether they were able to sustain their advocacy efforts and collective action through time; etc.). The combination of these criteria provides the basis for our assessment of political leverage. However, it is worth noting that the relationship between access and mobilization is not necessarily linear (See Tilly 1978).[26] In principle, when social actors are less organized and mobilized, it is more likely that their claims will not be part of the policy debate. However, in many cases, low levels of social mobilization might be the result not of structural problems of collective action, but of social actors having inside access to the policy process (Meyer 2004). In short, the assessment of the link between political access, resources and mobilization has to take into account the context of each case.

[26]I am adapting Tilly's (1978) explanation of the curvilinear relationship between social protest and political openness.

Table 3.3: Weak Political Leverage Fuzzy Set

1 = Fully in. **The social actors' political leverage is clearly weak**	Actors are not part of the policymaking process. And/or social demand over a policy issue is fragmented, atomized (sporadic and punctual claims or protests) and weak (social demand is not sustained through time, minimal collective action).
.67 = More in than out. **political leverage is more than less weak**	Social actors have formal access to policy process and are able to voice their concerns (participate in public hearings or have meetings with government officials, etc.). But actors' support structure for political action is weak (they lack resources); collective action is low (no massive street mobilizations or other type of massive collective actions), and actors are not able to gain support from or to mobilize broader constituencies.
.33 = more out than in. **political leverage is less than more weak**	Social actors participate in policy negotiations (they are members of committees or other institutional settings which allow them to have access to inside information, direct contact with policymakers, etc.). Or the level of organized collective action is relatively high (they are able to sustain advocacy efforts through time; to organize and carry out significant mobilizations and protests), and their claims gain support among elite groups or broader sectors of the public opinion (for instance, favorable coverage by relevant media).
0 = fully out. **The social actors' political leverage is clearly not weak**	Social actors are part of the policymaking process and show a high level of sustained and massive collective action. Social actors' positions and actions shape the policy agenda.

At this point it is useful to clarify, again, the differences between the political disadvantage argument assessed by this fuzzy set and the notion of the strict policy loser. These are two clearly different conceptual and empirical categories. The fact that an actor is a strict loser of a policy process does not necessarily indicate that the political leverage of that group is low, and vice versa. Taylor's (2008) analyses of the judicialization of social security reform policy in Brazil during the Cardoso administration is a good case to

exemplify the differences between the two concepts. Once the Brazilian congress approved the security reforms package after four years of intense legislative negotiations, interest groups hurt by the reforms such as the Brazilian Bar Association (OAB) and other professional unions, turned to the court to try to block the new legislation.[27] Clearly, these groups were losers of the policymaking process, but could hardly be considered politically disadvantaged; they had considerable political leverage and had access to the policy process.

Meanwhile, the opposite configuration refers to a type of cases in which the social actors posing demands on the state are politically disadvantaged but they are not strict losers of the policy process. This scenario seems quite counterintuitive: if a social group is not a policy loser, how can it be politically disadvantaged? There might different reasons and circumstances explaining why the elected branches of government passed regulations and set policies in favor of groups with low political leverage (ideological or normative reasons, international pressure, reputational costs for not acting, etc.). Whatever the reasons, the relevant point is that these groups are not losers of the democratic policymaking process. As I will show in the following chapters, this study identifies and analyzes several judicialized disputes that respond to this pattern. In these cases, the social actors making demands on the state had limited access and low political leverage to advocate and advance their policy goals and interests, but could not be considered strict losers of the policy process; they were demanding the implementation or enforcement of existing legislation or policy mandates.[28] In sum, there are clear

[27] In fact, the judiciary was already involved in this policy process even before the reform package was approved by congress. When the reform bill was under consideration in one of the legislative chambers, opponents of the social security reform filed a legal claim to suspend the congressional hearings based on procedural issues (for a more detailed overview see Taylor 2008, 61-62).

[28] In fact, this is not an uncommon situation in Argentina (or for that matter, in the region). As many observers of Latin American politics could testify, there are numerous examples of "symbolic" legislations and policies approved and established by the elected branches of government which are not fully enforced or implemented in practice (see, for instance, O'Donnell 1993; Weyland 2002).

conceptual and empirical differences between the political leverage of the social groups and whether they are strict losers of the policy process or not. Moreover, the way these two conditions combine can lead to substantially different type of political scenarios under which the judicialization of public policy might occur.

In its turn, the fuzzy set developed in table 3.4 refers to the role of legislative assemblies. It assesses the level and type of involvement of the legislature in the policy process and debate surrounding a policy issue. This fuzzy set is built around the notion of passiveness of the legislature discussed in the previous chapter.[29] As explained above, a passive legislature is basically one that does not take the policy initiative in a particular issue (that is, it does not initiate and pass its own legislative proposals), nor does it shape or modify policies proposed by the executive. Similarly, a passive legislature does not control how policies are implemented (or not) by the government. There could be many reasons explaining this "passive" behavior of the legislative assembly, but for the purposes of this study the critical point is that the legislature is neither working as a venue for accommodating and aggregating interests and views in the policy making process, nor as a central component of the system of check and balances, overseeing the implementation of policies by executive branch officials and agencies.

A key issue when assessing cases for this set is how to consider situations in which the government has legislative majorities. Governments regularly seek to garner legislative majorities supporting their policy initiatives and positions and this is part of the normal dynamic of majoritarian decision-making institutions. However, as mentioned above, the work of congress also entails policy deliberation and negotiation as well as

[29] The set can also reflect legislative inaction as a result from legislative stalemates and deadlocks, which is an argument stressed by the comparative literature on judicialization. Although, based on our previous knowledge of the cases covered by this research and also on the literature on the legislative power in Argentina, we do not expect legislative deadlocks to be a factor driving the demand for judicial intervention in these policy disputes.

overseeing and monitoring the executive. The focus of this fuzzy set, then, is not on whether the legislative assembly supported the government in a particular policy dispute, but rather on how the legislature inserted itself into the policy process. Accordingly, a legislative majority aligned with the executive is considered passive when the legislature approves executive policies without engaging in policy negotiations or without introducing policy changes, or when the legislative block aligned with the government does not allow congress to exercise its power to monitor the executive's implementation of existing policy.

Table 3.4: Legislature Passiveness Fuzzy Set

1 = Fully in. **The legislature is clearly passive**	The legislature delegates broad, open-ended policy making authority to the government over the issue. Or, the government takes unilateral policy measures, avoiding the legislature, and the legislature does not revise these policies.
.67 = More in than out. **The legislature is more than less passive**	Legislative majorities support the government policy without introducing/requiring substantial policy changes. Or, policy proposals are introduced in the legislature by opposition groups but are blocked by the government legislative block, and they fail to gain enough support to be considered in plenary.
.33 = more out than in. **The legislature is less than more passive**	Legislative majorities support the government policy in general but introduce substantial amendments. Or, policy proposals introduced by the opposition are treated in plenary, although they might not be approved. Or, the legislature performs its oversight role over the executive, holding hearings and requesting information to executive branch officials and agencies.
0 = fully out. **The legislature is clearly not passive**	The legislature is fully engaged in the policy making process. It takes the initiative, setting or substantially shaping the legislative agenda.

Meanwhile, the fuzzy set developed in Table 3.5 refers to the role of the executive branch of government. It assesses the extent to which politicians in charge of an administration are opposed to the policy demands made by social actors involved in a policy dispute. More importantly, when read in combination with the strict policy loser set described in Table 3.2, it helps assessing whether the political elites in charge of government trigger judicialization because their policy preferences are inconsistent with the goals and mandates of existing laws and policies. For instance, if a social group making policy demands on the state is not a strict policy loser (in other words, their demands are based on existing legislation), and the government is opposed to the groups' demands, that combination is suggesting that the government is not willing to implement or enforce existing policy mandates.

Table 3.5: Executive Opposition to the Policy Demands Fuzzy Set

***1* = *Fully in.* The Executive is clearly opposed**	The government takes strong actions and measures opposed to the social actors' demands. Alternatively, the government is openly opposed to taking measures requested by the social actors to modify the status quo in certain policy field.
***.67* = *More in than out.* The Executive is more than less opposed.**	The government's opposition to certain social demands (either to modify a status quo situation or to stop a policy reform) varies through time or among different members of government.
***.33* = *more out than in.* The Executive is less than more opposed.**	The government takes measures (either to modify the status quo in certain policy issue, or to stop a policy change) which are consistent with the social actors' policy goals, although the measures are considered insufficient
***0* = *fully out.* The Executive is clearly not opposed**	The government takes measures clearly consistent with policy demands made by the social actors.

Finally, the last fuzzy set (Table 3.6) evaluates the capacity of the state apparatus to intervene in a policy issue. This set speaks to the argument that a deficient state, unable to implement or enforce existing policies mandates, triggers the judicialization of policy. As mentioned in the previous chapter, a main challenge in assessing cases for this set is to empirically distinguish weak enforcement due to state deficiencies from that resulting from politicians' preferences. Accordingly, our state capacity fuzzy set focuses on more enduring and structural features of the bureaucratic capability to carry out its enforcement tasks. These are features that are usually the result of medium or long term processes and which, therefore, are not easily changed by short term variations in politicians' preferences. In contrast, political measures taken by a particular administration (for instance, reduction in the budget of an agency), although they can undoubtedly affect the ability of the state to implement certain legislation in the short run, they can also be relatively easily undone by a future new government.

Table 3.6: Deficient State Capacity Fuzzy Set

1 = Fully in. **The capacity of the state apparatus to intervene in a policy issue is clearly deficient**	The state lacks the proper physical (e.g., a running hospital to serve a certain area) and organizational infrastructure (trained human resources, etc.) needed to intervene in a policy issue. Alternatively, the institutional capabilities needed to intervene in a policy issue are heavily fragmented among different departments and levels of the state apparatus, without proper coordination.
.67 = More in than out. **The capacity of the state to intervene in a policy issue is more than less deficient**	The state suffers serious management and organizational problems to effectively and efficiently intervene in an issue (for instance, problems of communication and coordination, inadequate bureaucratic procedures, lack of human resources and lack of information, etc.).
.33 = more out than in. **The capacity of the state to intervene is less than more deficient**	There is a bureaucratic department responsible for a policy issue, and has the basic needed physical and organizational infrastructure. Problems in the state's involvement in a policy issue are related to choices made by the particular administration in charge of the government (e.g., budget cuts, limited legal powers assigned to an agency, etc.).
0 = fully out. **The capacity of the state apparatus to intervene is clearly not deficient**	There is a responsible bureaucratic department, which have sufficient organizational and institutional capabilities and resources. Capacity issues do not affect the involvement of the state apparatus in a policy issue.

QCA EMPIRICAL ANALYSIS

Table 3.7 presents the fuzzy-set membership scores of the 13 policy disputes under study. The first column lists the score of the outcome in each case (that is, the degree of membership in the set judicialized policy conflicts); the following five columns list the value of the causal conditions in each case. This fuzzy-set table works as an ordering device. Given the number of cases (13) and causal conditions modelled (5), it is

difficult to systematically compare these cases in the classical narrative mode of qualitative analysis. Clearly, this table makes the analytical comparison of the cases easier and more transparent, while keeping the configurational basis of the qualitative analysis.

Table 3.7: Fuzzy Membership Scores

Cases	*Judicialization*	*Policy Loser*	*Weak Political Leverage*	*Legislature Passiveness*	*Opposition of Executive*	*Deficient State Capacity*
Pollution Riachuelo basin	**1**	**.33**	**1**	**.67**	**.67**	**1**
Mining policy Esquel	**.33**	**.33**	**0**	**0**	**1**	**.33**
CEAMSE Ensenada	**.67**	**.33**	**.33**	**.67**	**.67**	**.33**
Oil production Llancanelo	**1**	**.33**	**.67**	**.33**	**1**	**.33**
Health care for HIV/AIDS people	**.67**	**.33**	**.33**	**0**	**.33**	**.67**
Hemorrhagic Fever vaccine (FHA)	**1**	**.33**	**.67**	**.33**	**.33**	**1**
Health coverage for disabled people	**.33**	**.67**	**.33**	**0**	**.67**	**0**
PRATPA. Indigenous land, Jujuy	**1**	**0**	**.33**	**.67**	**1**	**.33**
Lhaka Honhat. Indigenous land, Salta	**1**	**.33**	**.67**	**.67**	**1**	**0**
Indigenous people crisis. Chaco	**.67**	**.33**	**.67**	**.33**	**.33**	**1**
Train service reform	**.67**	**1**	**.67**	**.33**	**1**	**.33**
Public services tariffs increase	**.67**	**.33**	**.33**	**.67**	**.67**	**.33**
Re-structuring Phones tariffs	**1**	**.67**	**.67**	**.67**	**.67**	**.33**

As Table 3.7 shows, there are no cases with 0 membership score in the set policy judicialization. Even though there is still a significant variation in the level of judicialization among the policy conflicts covered by this study, this situation merits a clarification. In appendix B, I explain in detail the conceptualization and the conditions a negative case has to fulfill in order to be considered a "relevant" negative case for this study.[30] As described in that appendix, during my field research I identified many instances of policy disputes in which the involved governments were unresponsive but the conflicts were not judicialized. The lack of judicialization, however, was usually related to the absence of one or more of the enabling conditions for judicialization.[31] A common situation, for instance, was that certain social actors making policy demands on the state, lacked proper legal standing or did not have sufficient legal bases to bring claims to the courts. These types of non-judicialized cases might be relevant for assessing, for example, whether a proper legal framework is a necessary enabling condition for judicialization to occur; but they are irrelevant to analyze what political conditions might trigger the judicialization of policy issues –which is the purpose of this study-, because the lack of judicialization is due to the absence of one of the enabling conditions in the first place. In short, these non-judicialized disputes do not meet the scope conditions of our research and, therefore, do not help in assessing the theoretical propositions of this study.[32]

---

[30]For the concept of relevant negative cases, see Mahoney and Goertz (2004) .

[31] As explained in chapter 1, judicialization occurs when certain enabling conditions are in place: namely, a favorable legal framework, a relatively autonomous judiciary and a certain level of organizational support.

[32] To further clarify the issue of scope conditions, the theoretical framework of this study can be formally specified with a Boolean notation: X = (A+B+C+D+E) * (F*G*H).
Where X = policy judicialization (outcome), A = policy loser, B = low political leverage, C= inefficient legislature, D = opposition of executive, E=deficient state capacity, F= favorable legal framework,
G = autonomous judiciary, and H = support structure. The symbol * indicates the logical AND, and the symbol + indicates the logical OR.
The set A, B C D and E constitutes the core of this study's theoretical framework. We want to assess whether any of these political conditions, individually or combined, might be sufficient to trigger the

It is worth stressing, however, that despite the lack of cases with 0 membership in the set judicialization, the study does capture relevant variation in the outcome. It includes policy disputes that are fully (1) or quite judicialized (.67), and policy conflicts in which judicialization is not really relevant (.33). As explained earlier in the chapter, the cases in which judicialization was not relevant refer to disputes in which legal claims were brought and admitted to the courts, but the judicial procedures did not become an important venue in which the policy process and debate evolved. In these cases, the courts did not displace the other branches of government nor added another main forum for policy negotiations. In short, these are cases that have a weak membership in the fuzzy set judicialization; in other words, they are more "out" than "in" the set, and therefore can be considered as negative cases. Furthermore, these "less than more" judicialized disputes clearly fall within the scope conditions of this research, and hence, are "relevant" negative cases for this study (Mahoney and Goertz 2004).

Once we have clarified this issue, the next step is to identify which are the empirically relevant conditions, or combinations of conditions, linked to our outcome. With five causal conditions, there are 32 logically possible causal combinations.[33] That is, there are 32 possible different scenarios under which judicialization might occur. At this point, it is worth reminding the reader what is the analytical focus of qualitative comparative analysis (QCA), and how it differs from the standard co-variation analysis. As explained by Ragin (2005) while the central goal of co-variation analysis is to isolate and estimate the independent net effects of causal variables on an outcome, QCA seeks to

---

judicialization of policy. The logical AND (*) links this core theoretical proposition with the second set of conditions. F, G and H are, jointly, necessary conditions for judicialization to occur, and constitute the scope conditions of this study. Thus, only cases that meet conditions F, G and H (in other words that are potentially judiciable), are relevant to assess whether political conditions A, B, C, D or E triggers policy judicialization.

[33] As explained by Ragin (2000), QCA analysis can be better understood by viewing the property space as a multidimensional vector space with 2K corners, where K is the number of causal conditions. Therefore, in our study there are 5 causal conditions, then, there are 32 logically possible causal arguments.

discern the different combinations of causally relevant conditions linked to that outcome. In other words, QCA's primary analytical focus is not on the net effects of independent variables but on the different ways causal conditions combine.

Continuing with the analysis, I use the computer program fs-QCA 2.0 (Ragin et al. 2006) to identify which are the empirically relevant causal combinations in our study.[34] The analysis indicates that 10 out of the 32 possible causal paths have instances of the policy conflicts examined in this study.[35] Table 3.8 lists these 10 causal combinations (columns 1 to 5) and specifies which policy disputes are covered by each of them (column 6).

Table 3.8: Causal Combinations and Distribution of Cases

Policy Loser (1)	Weak Pol Lev (1)	Legis Pass (1)	Exec Opp (1)	Def Sta Capacity (1)	Number of Cases (2)	Consistency	Outcome(3)
0	0	1	1	0	3 (Jujuy; Ceamse; Tariffs utilities)	1	1
0	1	0	0	1	2 (FHA; Chaco)	1	1
0	0	0	0	1	1 (HIV-AIDS)	1	1
0	1	1	1	0	1 (Salta)	1	1
0	1	0	1	0	1 (Llancanelo)	1	1
1	1	1	1	0	1 (Phone)	1	1
0	1	1	1	1	1 (Riachuelo)	1	1
1	1	0	1	0	1 (Trains)	1	1
1	0	0	1	0	1 (Disability)	0.89	0
0	0	0	1	0	1 (Esquel)	0.89	0

(1) 1 indicates that, in a given case, a causal condition is relevant / present and 0 indicates that a causal condition is irrelevant / absent. A causal condition is considered to be relevant /present, when the membership score of a case in that fuzzy set is greater than 0.5.
(2) Fs-QCA analysis requires establishing a threshold of number of cases for assessing which combinations of causal conditions are relevant to explain the outcome. Given that the number of cases for the study is relatively small, I follow Ragin's suggestion (2009) of establishing a frequency threshold of one case. Hence, the 10 causal combinations are empirically relevant.
(3) The outcome is based on the consistency score. If a causal combination is considered inconsistent, the outcome is 0, if it is considered consistent, the outcome is 1.

[34] The program can be downloaded from: http://www.u.arizona.edu/~cragin/fsQCA/software.shtml
[35] For a detailed explanation of the mathematical logic of this stage of the fuzzy set analysis, see Ragin (2009, 94-103).

Table 3.8 also indicates the degree of consistency between each of these causal combinations and the outcome, judicialization (column 7). To explain what consistency indicates in QCA analysis, I need first to briefly explain the notion of sub-set relation. A subset relation basically means that one set (causal combination X) is contained within another set (the outcome Y); in other words, X is a subset of Y. When the concept of subset relations is applied to the study of causal complexity, it indicates that a specific causal combination may be interpreted as sufficient for an outcome to happen. As explained by Ragin (2000, 2009), if cases sharing a causal combination also exhibit the same outcome, then these cases constitute a subset of instances of the outcome. Such a subset relation signals that a specific causal combination might be sufficient for the outcome. If there are other sets of cases sharing other causal combinations and also exhibiting the same outcome, then these combinations also may be interpreted as sufficient for the outcome. Consistency, then, basically assesses the degree to which cases sharing a given causal configuration also agree in displaying the outcome in question. As column 7 shows, the first eight configurations have a perfect consistency degree (1), which indicates that these combinations of conditions are a subset of the outcome, and hence, can be considered sufficient conditions for judicialization to occur. At the same time, there is a substantial gap between the first eight combinations and the last two rows, which provides a strong basis to consider these two last causal combinations as inconsistent.[36] This is not surprising given that they covered cases in which the courts were not relevant venues in the unfolding of the policy process. In short,

[36] In principle, values below 0.75 are considered to be inconsistent. However, good practices in QCA analysis recommend a higher cut-off value if there is a substantial gap in the upper ranges of consistency scores like in our study (see Ragin 2009). For that reason, we consider the 0.89 value of the last two rows as inconsistent, given that all the rest of the cases have a perfect degree of consistency (1).

this suggests that these last two combinations are insufficient for triggering the judicialization of policy disputes.

In the next step of the QCA analysis, the eight consistent causal combinations previously identified are logically reduced into a more parsimonious result through a process of Boolean minimization. The most fundamental rule in this logical procedure is the following: *"...If two Boolean expressions differ in only one causal condition yet produce the same outcome, then the causal condition that distinguished the two expressions can be considered irrelevant and can be removed to create a simpler, combined expression…"* (Ragin 2008, 38). Appendix C describes how the process of minimization was performed. The result of this process shows that there are three alternative main combinations of political conditions under which policy disputes are likely to become judicialized.[37] Below, I describe with a Boolean notation the minimal formula composed by the three configurations (in Boolean language, uppercase indicates "positive" values or presence and lowercase indicates "negative" values or absence; furthermore, the symbol * indicates the logical AND, and the symbol + indicates the logical OR):

Policy loser * Legislative passiveness *Executive opposition* DEF STATE CAP +
(cases covered: FHA; Chaco; HIV-AIDS)

Pol loser * LEG PASS * EXE OPP +
(cases covered: Ceamse; Jujuy; Tariffs; Salta; Riachuelo)

WEAK POLITICAL LEVERAGE * EXE OPP ⟶ JUDICIALIZATION
(cases covered: Phone, Llancanelo, Trains, Riachuelo, Salta)

[37] In QCA terminology, this result is known as the "intermediate" solution. Appendix C also describes the two other results that can be obtained from the QCA minimization procedure: the complex and the parsimonious solution.

In plain language, this Boolean formula reads as follow: judicialization is observed when the state is deficient, and the actors are not strict policy losers, the legislature is not passive and the executive is not opposed to the social demands (first configuration); or when the actors are not strict policy losers and the executive is opposed and the legislature is passive (second configuration); or when the social actors have low political leverage and the executive is opposed to their demands (third configuration).

To further enhance the QCA analysis, I also list the causal configuration covering the two policy conflicts in which judicialization was not relevant; in other words, the causal combination encompassing the negative cases of our study. The process of minimization of these two cases is very simple; they differ only in one condition (policy loser), which therefore is removed to create a relatively simpler combination:[38]

Weak pol lever * Leg pass * EXE OPP * def state cap ⟶ WEAK OR NON JUDICIALIZATION
(cases covered: Esquel, Disability)

In this case, the Boolean formula reads as follows: weak or non-judicialization can be observed when the executive is opposed but the social actors have political leverage, and the legislature is not passive and the state apparatus is not deficient.

INTERPRETATION OF THE QCA RESULTS

What do these results mean? How can we read them beyond the logical description we did above? It is worth remembering that QCA is basically a way to formalize comparative case-oriented analysis. The goal is not to make causal inferences

[38] Although this causal combination displays the outcome (weak or non-judicialization), it is worth noting that its degree of consistency is quite low, 0.67. This suggests that the causal relationship is not strong enough to consider this combination as regularly sufficient for this outcome to occur. Nevertheless, we include this combination because, as it is shown below, it provides some interesting insights about the relationships that can developed between certain conditions and how they might impact on the outcome.

per se, but to help in the process of causal analysis and interpretation. In other words, the minimal Boolean formulas are not "explanations" of a given outcome (De Meur et al. 2009). It is the researcher's task to make sense of these descriptive formulas based on the knowledge of the cases and in dialogue with the theoretical framework. Following, I provide a first, brief interpretation of the QCA results:

Policy loser * Legislative passiveness * DEFICIENT STATE CAPACITY *Executive opposition ⟶ JUDICIALIZATION

(cases covered by this causal combination: HIV/AIDS, Chaco, FHA)

The first causal combination indicates that judicialization of policy disputes is likely to occur in political scenarios in which the involved social groups are demanding the implementation or enforcement of existing policy mandates (therefore, they are not strict losers of the policy processes), congress is attentive to the social demands, the political elite in charge of the executive is not opposed to the policy in question, but the state apparatus is unable or deficient to fully carry it out. The policy conflicts covered by this causal combination show processes of judicialization triggered by the lack of implementation of policies and programs due to serious, structural problems of state capacity, even when the political elites in charge of the government relatively supported implementation or at least were not openly opposed to it, and the legislative assemblies were somehow attentive to the issue and involved in the policy process. In other words, these cases involved disputes about policy goals and mandates which have been approved and established by the political branches of government but that the state as an organization could not properly deliver. In short, this scenario stresses deficiencies in the state rather than problems in the political system as triggering the judicialization of policy issues.

Policy loser * EXECUTIVE OPPOSITION * LEGISLATIVE PASSIVENESS ⟶ JUDICIALIZATION

(cases: Jujuy, Tariffs, Salta, CEAMSE)

The second causal configuration indicates that public policy is likely to become judicialized in scenarios in which the involved social groups demand the implementation or enforcement of existing policy mandates (they are not strict policy losers), but the politicians in charge of the executive branch of government are opposed to the existing policies, and the legislature fails to check and control the executive. In contrast to the first combination that stressed problems of state capacity, the distinguishing feature of this second scenario is that the political elites in charge of the executive do not fully uphold existing policy mandates or they enforce them according to their own policy preferences. Furthermore, this occurs in contexts in which the legislature is generally passive and deferential to the government in relation to the policy under dispute, allowing the executive to interpret and apply existing laws as it pleases. In short, this configuration points out the discretionary exercise of power by the executive and the weaknesses of legislative mechanisms of political accountability as triggering the judicialization of policy issues.

WEAK POLITICAL LEVERAGE * EXE OPPOSITION ⟶ JUDICIALIZATION

(cases: Llancanelo, Trains, Phones and Riachuelo)

The third causal combination indicates that the judicialization of public policy issue is likely to occur in political scenarios in which the involved social groups do not have enough political leverage to influence the policy process, and the government is opposed to policy measures demanded by the social groups. The cases with strong

membership in this causal combination show policy disputes in which there are social groups opposed to a government's policy, but the social opposition is very isolated or fragmented, unable to gain support from broader constituencies, and therefore, it is politically too weak to be a significant party in the policy negotiations and to influence the policy process. In short, this configuration is the paradigmatic example of judicialization triggered by politically disadvantaged groups.

Weak political leverage * Legislative passiveness * EXECUTIVE OPPOSITION *deficient state capacity ⟶WEAK JUDICIALIZATION

(cases: Esquel, Disability)

The last causal configuration refers to policy conflicts in which judicialization was not relevant. These are cases in which legal claims were brought to and admitted by the courts, but the judicial procedures did not become a main venue in which the policy process and negotiations evolved. As mentioned above, we cannot make strong claims about the causal sufficiency of this combination in relation to the outcome weak or non-judicialization. Nevertheless, the configuration does allow for some interesting insights and interpretations. It indicates that when a conflict develops because the executive is opposed to policy demands made by certain social groups, the involvement of courts and judicial procedures in a policy conflict is not likely to be relevant if the social groups have political leverage, congress is attentive to the issue and involved in the policy process, and the state apparatus is capable. In short, this scenario suggests that the opposition of the politicians in charge of the government is not a sufficient factor, per se, for a policy dispute to become fully judicialized. Moreover, it also seems to imply that the combination of an active and involved legislature and social actors with political

leverage can counterbalance and contain the executive's exercise of power, making the full judicialization of policy disputes relatively unnecessary.

Summing up, the qualitative comparative analysis (QCA) identifies three combinations of causal conditions that are sufficient to trigger processes of policy judicialization in Argentina. None of these three configurations, however, is both sufficient and necessary to produce the outcome. This would mean that one of the conditions or combination of conditions has to be always, or almost always, present for judicialization to occur. On the contrary, the analysis shows that these three causal combinations constitute alternative political scenarios, and each one offers sufficient bases for triggering the judicialization of policy disputes in Argentina. Moreover, the QCA analysis also pinpoints at least one configuration of political conditions under which policy disputes are not likely to be fully judicialized.

THEORETICAL AND EMPIRICAL IMPLICATIONS

Although the last chapter develops the conclusion of this study in more detail, in this section I briefly flesh out some of the main theoretical and empirical implications of the QCA analysis. First of all, the QCA results clearly demonstrate that the judicialization of public policy is a result of a much more complex political picture than the widespread notion of the policy loser portraits. It makes evident that the attempt to explain processes of judicialization by just arguing that those who litigate is because they cannot attain their policy goals through the policy venues, clearly oversimplifies how democratic governance works. Furthermore, it misses the possibility of exploring the links between judicialization of public policy and the political scenarios in which those issues and disputes develop.

Second, the existing theoretical explanations considered and assessed throughout this research (namely, the political disadvantage and the political fragmentation arguments, including a strict formulation of the policy loser argument as the one developed in our QCA analysis) can explain certain types of cases of judicialization of public policy, but not others. For instance, the political disadvantage argument was only fully reflected in one of the three political scenarios under which judicialization was likely to occur in Argentina according to our QCA results; in the other two scenarios, the political leverage of the involved social actors was not a key condition. This is a finding of significant empirical and theoretical value given that observers and scholars generally overstress the relevance of under-represented actors when explaining the phenomenon of judicialization of policy issues. This is an even more striking finding when one takes into account that the policy fields covered by the study involved populations that are historically disadvantaged social groups like indigenous people, or suffer from structural problems of collective action like the cases of societal demands for consumer or environmental protection. Moreover, in relation to the political fragmentation argument, legislative deadlocks or stalemates were not a factor at all in explaining the judicialization of public policy issues in the cases covered by this research. Indeed, most of these policy conflicts occurred in political contexts that could hardly be considered fragmented, and in which the involved governments had policy making majorities or were potentially able to garner the legislative support they needed.

It is worth stressing that this does not mean that these causal arguments are invalid, but rather that they can explain only certain types of cases of policy judicialization. A key contribution of my QCA analysis is precisely to show that there are substantially, different configurations of political conditions under which public policy

disputes are likely to become judicialized, and that the existing theoretical arguments can explain only some of them.

Third, the QCA results validate the empirical relevance of the two weak rule of law scenarios I develop in chapter 2 for explaining the phenomenon of judicialization of public policy in Argentina. In two out of the three final combinations identified through the QCA analysis, the judicialization of policy issues was related to the inability or unwillingness of the state to uphold policy goals and mandates already in force. In one scenario, this was the result of the lack of a capable and effective state apparatus to deliver the public goods resulting from democratic policymaking processes and expressed in the legislation. In the other scenario, judicialization was related to the fact that the elites in charge of the executive branch of the government did not apply the law when it contradicted their policy preferences, or at most, they applied it in ways that were beneficial to or consistent with their preferences. Moreover, this discretionary behavior of the elites in charge of the executive was generally complemented by the passivity of the legislative assemblies, who failed to fully exercise their power of legislative control and oversight. This combination of discretional exercise of executive powers and relatively passive legislatures underlines a chronic problem of weak accountability affecting democratic governance in Argentina (O'Donnell 1994), which in turn, becomes another main trigger for the judicialization of policy issues in this country.

Finally, from a theory building point of view, the formulation and empirical validation of these of two configurations of conditions as significant scenarios in which policy judicialization is likely to occur, is a main contribution of my research. These configurations (especially the one built around the notion of state deficiencies and to a lesser extent the combination between discretional exercise of executive power and the passive role of the legislature) had not been really conceived and analyzed by the

specialized literature as triggering the demand for judicial involvement in public policy disputes. In this way, the two types of causal configurations identified and developed by this study, can be visualized as building blocks for a typological theory about the political conditions leading to judicialization of public policy.[39]

After this brief analysis of the QCA results and its theoretical and empirical implications, the following four chapters develop the case studies of all the policy disputes encompassed by each of the causal configurations resulting from the QCA.

[39] In the last chapter of this dissertation, I analyze in more detail the contribution of my research and the prospects of constructing a typological theory. At this point, I just want to stress again that the notion of typological theory is inherently open to the possibility of equifinality. In other words, it allows for different alternative "types" of causal configurations in relation to a certain outcome (see George and Bennett 2004).

CHAPTER 4: STATE DEFICIENCIES AS A SOURCE OF JUDICIALIZATION

This chapter describes and compares three of our cases of judicialization of public policy in Argentina: the 2007 health and food emergency affecting the indigenous communities living in El Impenetrable (Chaco), the provision of treatment and medicines to people living with HIV-AIDS during the 1990's, and the production of the vaccine against the Argentine hemorrhagic fever or *"mal de los rastrojos"*. Based on the QCA analysis developed in the previous chapter, these three cases shared a common, basic pattern: the involvement of the courts in these policy processes occurred in contexts in which the legislature and the executive were attentive to the issues, and sometimes even supportive of the policies in question, but the state apparatus was ill prepared to fully implement/enforce them. In short, these three cases of policy judicialization share a causal configuration built around the weak capability of the state apparatus to fulfill existing policy mandates.

Given that this is the first of the empirical chapters of the dissertation, it is worth explaining again, the reasons for including case studies. First, a detailed, historical analysis of the cases allow for assessing the QCA coding of the outcome and causal conditions presented in chapter II. This speaks to the transparency and replicability of the fsQCA analysis. Second, the case studies allow for assessing the internal validity of the minimal formulas developed through the QCA analysis. In other words, they allow for examining whether the "thick", historical narratives and analysis of the cases reflect the causal configurations resulting from the QCA. To facilitate this endeavor, I include the fuzzy set scores of the causal conditions for the three cases analyzed in this chapter.

Table 4.1: Fuzzy Membership Scores of Causal Conditions

Cases	*Policy Loser*	*Weak Political Leverage*	*Legislature Passiveness*	*Opposition of Executive*	*Deficient State Capacity*
Indigenous people crisis, Chaco	**.33** (1)	**.67**	**.33**	**.33**	**1**
Health care for HIV/AIDS people	**.33**	**.33**	**0**	**.33**	**.67**
Hemorrhagic Fever vaccine (FHA)	**.33**	**.67**	**.33**	**.33**	**1**

(1) As explained in the previous chapter, in fuzzy set language, 1 means a case has full membership in a set, .67 means that a case is more in than out of a set, .33 means a case is more out than in a set, and 0 means a case is clearly excluded from the set. When these scores are translated into Boolean logic, scores 1 and .67 indicate that a causal condition is relevant or present in a given case. On the contrary, scores .33 and 0 indicates that a causal condition is irrelevant or absent.

The configuration displayed by these judicialized policy disputes reflects one of our theoretical arguments about the type of political scenario under which judicialization of public policy is likely to occur in Argentina. This argument has a couple of main elements that the reader should pay special attention when reading these case studies. First, in this type of disputes, there are legislation and policies already approved by the democratically political venues, the legislature and the executive. The judicialization of these policy issues, then, is not triggered by losers of policymaking process turning to the courts, but by social actors demanding the state to uphold relatively clear existing policy mandates. Second, the lack of implementation and enforcement of these legislation and rules occurs in a political context in which the political elites controlling the government relatively support the policies in question or are not openly opposed to them. However, and this is the key element in this scenario, the state apparatus has serious, structural limitations to properly fulfill the legal mandates.

The three cases examined in this chapter are organized in the following way: The first part of each study is a historical description of how the particular policy issue evolved and became judicialized. This part emphasizes the chain of events and situations leading to the involvement of the judiciary in the policy process. The second part constitutes a more "focused" analysis. It only deals with those aspects or features of a case that directly speaks to each of the five conditions that are theoretically relevant for this study: losers of the policy process, political leverage of the involved social actors, the passivity of the legislature, the opposition of the executive, and state capacity. This part of the analysis parcels out different aspects of the case in order to gain more analytical leverage. Finally, the chapter concludes with an analysis of the similarities and differences between the three cases examined, and an overall assessment of the validity of this causal path to the judicialization of policy.

THE 2007 HEALTH AND FOOD EMERGENCY AFFECTING INDIGENOUS POPULATION IN "EL IMPENETRABLE"

During the last months of 2006, groups working on indigenous issues publicly alerted about the lack of food and the levels of health deterioration affecting indigenous communities living in "El Impenetrable", a dense forest region in the west part of the province of Chaco.[40] The reports were not referring to a novel state of affairs, but rather to the deepening of an already critical social situation. Historically, indigenous communities in the Chaco have suffered very high levels of poverty as well as very low levels of social development (high level of infant mortality, low life expectancy, etc.).

[40]In December 2006, the Centro Mandela, a local NGO from the province of Chaco, made presentations to the human rights secretary of the national government and to the national Ombudsman about the health and food situation of the rural indigenous communities in El Impenetrable (Página 12, "Genocidio étnico en El Impenetrable, May 21, 2007). Furthermore, the Human Rights Secretary of the national government also received reports from the Chaco Human Rights Commission about the critical health situation of the indigenous communities in the region (information cited by the plaintiff's legal claim, p. 40).

This social situation has persisted over time regardless of the existence of national and provincial legislation and diverse social programs aiming to address the needs of this population.

Few months later, in April 2007, the Chaco Aboriginal Institute (*Instituto del Aborigen Chaqueño, IDACh*) issued Resolution 64 declaring the state of food and health emergency affecting the indigenous communities.[41] The Resolution described the lack of medical staff and medicines affecting the provincial health system in the region and denounced an increase in the number of deaths among the local population. Local and national media attention around the issue began to grow.[42] By the middle of 2007, the health situation in the region worsened with the arrival of the winter. Between July 11 and the first week of August, at least 11 indigenous people were reported death due to malnutrition and other poverty-related sickness.[43] The main national newspapers (La Nación, Clarín, Página 12) gave great coverage to the issue and national TV channels had their news programs at prime time covering what was happening in Chaco.[44] The health and food situation of the indigenous communities in the Chaco became an issue of national public attention.

---

[41] The IDACh is an autarchic agency established by provincial law 3258/87. It is the agency, within the provincial state apparatus, in charge of dealing with indigenous issues, but at the same time it represents the interests and concerns of the indigenous communities in relation to the state. IDACh's authorities are not appointed but are elected by the indigenous population of the province of Chaco.

[42] An episode that raised a lot of media attention was a trip to the provincial capital city of Resistencia of a group of indigenous people suffering severe problems of malnutrition. The trip was organized by Centro Mandela, with the purpose of delivering a petition to the provincial health minister requesting urgent government measures to address the ongoing health situation in El Impenetrable. The Health Minister R. Mayol did not agree to meet the group, but pictures of the sick covered central pages of local newspapers (see for instance, Diario Norte, "Dramático pedido de asistencia sanitaria para aborígenes al borde de la muerte", May 16, 2007).

[43] Data reported by the Centro Mandela and cited by Página 12 ("Ya son 11 las víctimas del frio y la desnutrición", August 7, 2007).

[44] For example, Telefe Noticias covered the issue on August 11, 2007. Similarly, America TV has specials on the situation of the Chaco indigenous communities in July and August (data cited by the national ombudsman in its legal claim).

Meanwhile, the national and provincial governments were somehow trying to respond to the increasing social concern. In April, the national government began an emergency program delivering food aid to the affected communities every two months, but the main responsible in addressing the situation of the local population was the government of the province of Chaco. At that moment, the provincial government was held by an electoral coalition led by the UCR. The governor was Roy Nikish (Dic. 2003-Dic. 2007) also belonging to the UCR.[45] The first reaction of the provincial government was to minimize the existence of a health crisis. The health minister publically stated that the provincial public health system was reaching most of the population in the province and cultural factors explained why indigenous communities often did not access the health system.[46] Nevertheless, and regardless of these types of statements, the provincial government finally did assign more funds to social programs targeting indigenous population.[47] The provincial legislature also got involved in the policy debate. The legislature discussed and approved a couple of resolutions proposed by the opposition, calling the government to improve the measures taken to address the emergency and to better coordinate their efforts with the national government. A proposal to declare a Provincial Health and Food Emergency, however, was rejected by the party of the government which controlled the legislature.

---

[45] The UCR governed the province since 1995 (1995-1999, and then 1999-2003). The Peronist party governed the province since the return to democracy in 1983 until 1991. During the period 1991-1995, a provincial party, Acción Chaqueña, ruled the province.

[46] Página 12 ("Genocidio étnico en El Impenetrable", May 21, 2007).

[47] The government passed Decree 1057/07 assigning funds to the IDACH for social programs. Furthermore, the government passed other decrees re-directing part of the budget of different state agencies (Minister of Production, Housing Agency, etc) to target indigenous communities. These measures, however, were not the result exclusively of the health and food crisis, but of a broader negotiation between the government and the IDACH that began as a result of a series of indigenous protests that occurred during the year 2006 concerning mainly land tenure rights (See Acta Acuerdo entre el Instituto del Aborigen Chaqueño y el Poder Ejecutivo de la Provincia del Chaco, August 23, 2006).

Meanwhile, indigenous groups and their allies strongly criticized how the provincial government, and to lesser extent the national government, were addressing the crisis. They claimed that the situation on the ground did not improve, and that the governments' actions were insufficient to address the situation affecting the communities. ENDEPA (*Equipo Nacional de Pastoral Aborígen*), the agency of the Catholic Church working on indigenous issues, made a very strong public statement criticizing the state's response to the crisis in the Chaco.[48] The National Ombudsman, in its turn, began an inquiry about possible human rights violations of the indigenous communities living in El Impenetrable.[49]

By September 2007, the health and food crisis was judicialized. The national Ombudsman filed a *recurso de amparo* at the Supreme Court against the national government and the government of the province of Chaco ("Defensor del Pueblo de la Nación c/ Estado Nacional y otra (Provincia del Chaco) s/ proceso de conocimiento (D.587.XLIII)").[50] The plaintiff asked the Court to order the governments to take measures to improve the living conditions of the indigenous communities in El Impenetrable. Furthermore, the Ombudsman asked as a provisional remedy to order the governments to send medicines, food and drinkable water to cover the immediate needs of the affected population as well as medical assistance and equipments to fumigate

---

[48] Diario Norte ("La Pastoral Aborigen responsabiliza al gobierno por la situación indígena", August 8, 2007).

[49] A team from the ombudsman office visited the region to assess what was happening on the ground. The team's report is dramatic. It provides a detailed description of the living conditions of the families interviewed in the different communities visited by the team. The report concluded that most of the population in those communities lacked access to potable water, enough food, health care services and suffered from endemic sickness (See Viñas et al. 2007).

[50] Even though the legal strategy was defined by the Ombudsman office, the office was in closed contact with the local organizations, especially with IDACH. At that time, a legal issue that raised a lot of uncertainty was whether the Supreme Court had jurisdiction or not over the issue. To strength the legal argument for the Court's jurisdiction, the Ombudsman decided to fill the *recurso de amparo* alone, and the local organizations agreed with that strategy (interview with Lic. Adriana Viñas, Buenos Aires, July 10, 2008). For a brief explanation of what a *recurso de amparo* is, see footnote 9, in chapter 1.

against pests. The Court granted the provisional remedy and also ordered the national and provincial governments to provide information about demographics, budget and levels of implementation of the social programs in the region. The Court convened a first public hearing on November 6, 2007, to hear the parties' positions and to gather information about what was happening on the ground. The defendants argued that the provisional remedy was not necessary because the governments were already taking measures to address the crisis. Officials from different agencies of the national and provincial governments provided detailed data about the range of existing social and health programs. However, they could not explain the poor results in the field. As the hearing evolved, the operation of the existing programs and the effectiveness of the state intervention became the focus of the questions and concerns of the Justices.[51] As result, the Court scheduled a new hearing in April 2008 to follow up the implementation of the provisional remedy and the development of the situation on the field.

Meanwhile, in September 2007, Chaco had elections for governor and for the renewal of half of the provincial legislature. The main opposition party, the Peronist party, won the election for governor by a small difference. The electoral coalition led by the UCR won the legislative election and kept the majority of the legislative assembly.[52]Although the health and food crisis affecting the indigenous communities did not seem to occupy a central place in the provincial electoral campaign, local newspapers pointed out that the Tobas, the ethnic group that was most affected by the situation, largely supported the Peronist candidate for governor.[53] Furthermore, the Peronist party

[51] For accounts of the hearing see Clarín ("La Corte, insatisfecha con los informes sobre la situación de los aborígenes en el Chaco", November 7, 2007) and also Página 12, on the same date ("Inédita audiencia por los aborígenes").

[52] 16 legislative seats were renewed. The UCR won 9 and the Peronist party 7 of the seats. The UCR and its allies still held the majority of the assembly with 18 seats (56%), the Peronist party had 11, and other parties had 3 seats.

[53] See, for instance, comments about the electoral vote of the indigenous communities in Diario Norte ("Inocencia Charole, la vuelta de un dirigente aborígen a Diputados", September 20, 2007).

had a Toba indigenous leader, Inocencia Charole, as one of the legislative party candidates. When she assumed her legislative seat, Charole was the only indigenous member of the provincial legislature.

In December 2007, the new governor, Jorge Capitanich, took office. The new administration was much more accessible to the indigenous groups. It immediately declared the Health and Food Emergency (Decree 115/07) and substantially increased the budget for indigenous programs. Furthermore, the government launched a new initiative called Hunger Zero (*Hambre Cero*) targeting the local communities in El Impenetrable. Nevertheless, the health and social situation of the affected communities did not improve significantly. Reports produced by the Centro Mandela (Nuñes 2008) and by the national Ombudsman office (Defensoría del Pueblo de la Nación 2008) acknowledged that the governments were taken measures, but they also stressed that many basic needs of the communities were still unsatisfied, especially in relation to the health care system. As with measures taken by the previous administration, structural problems of state capacity affected the potential impact of the governmental policies in El Impenetrable. A mission of the Pan American Health Organization (PAHO) visited the region invited by the provincial and the national governments. Its report stressed that the public health care system in the region was extremely poor, hospitals' building were tumbledown and in many places there were no doctors. Even basic infrastructure to implement social

---

In relation to the electoral relevance of the indigenous vote in the province of Chaco, I did not find official data about indigenous people electoral participation, nor even about the actual number of indigenous people living in the province of Chaco. Media sources estimate the total indigenous population of Chaco in 60.000. Moreover, around 30.000 indigenous were registered in the 2008 IDACH's electoral roll (Diario Norte, "Casi 30.000 aborígenes votarán para renovar la conducción del IDACh", July 26, 2008). Based on that information, I estimate that indigenous voters accounted for 4% to 6.5% of the provincial electorate (527.327 people voted in the 2007election for governor, source: Tow, Atlas de Elecciones en Argentina). Nevertheless, I have no information to weight the distribution of the indigenous vote among the three main ethnic groups living in the province of Chaco: Tobas, Wichis and Mocovies.

programs, such as storage places for food aid, was sometimes lacking (Organización Panamericana de la Salud 2008).

In this context, the process of judicialization continued. As mentioned above, in April 2008, the Supreme Court held a new hearing between the national and provincial governments, the Ombudsman and the IDACh, mainly as a way to monitor and follow up the implementation of the provisional remedy. Almost a year later, in March 2009, and based on a request from the IDACh and the other parties, the Court convoked a new, closed meeting, as result of which the Court ordered the national and provincial governments to present a common plan of action to address the critical health and food situation affecting the indigenous communities of El Impenetrable.[54] At the time of writing this case study (fall 2009), the judicial procedure was still open.

Analysis of conditions triggering judicialization

This first issue to analyze is whether the indigenous groups and its allies were "losers" of the policy process or not. Even though a too quick reading of this case might suggest an affirmative answer to this question, a deeper analysis of the evidence indicate that the social demand for a strong government intervention in the Chaco's food and health crisis can hardly be considered a policy loser. Two main reasons justify this assessment. In the first place, and as mentioned above, there were already legislation that established clear legal mandates over the provincial government and the national government to address the social needs of the indigenous communities. At the provincial level, the Aboriginal Law 3285/87 states the general purpose of improving the living conditions of the indigenous communities, and establishes particular policies to be implemented by the state. For instance, chapter IV of the law refers to health care, and

[54] See La Nación ("La Corte Suprema obliga al gobierno a asistir a los aborígenes del Chaco", March 25, 2009); also Diario Judicial ("La emergencia no cesa", March 25, 2009).

states basic operational policies to be implemented by the minister of health such as creating health centers in indigenous inhabit areas, training health agents from within the indigenous communities, even making transportation available to move patients from the rural areas to medical centers. This provision about transportation is a good example of the lack of implementation of the existing policy mandates. For the reader, this might appear to be a minor issue, but a very common complaint among the affected communities in El Impenetrable was precisely the lack of transportation. In other words, there were no ambulances to quickly move seriously ill patients to the medical centers, and as reported by the NGOs and the Ombudsman office, the lack of transportation -in many cases- lead to the death of people gravely sick.

Similarly, at the national level, Law 23302/85 declares of national interest the support and development of the indigenous communities and created the *Instituto Nacional de Asuntos Indígenas* (INADI) with legal authority to elaborate and implement measures in different policy fields, including heath care (see for example, chapter VI of the law). Furthermore, there was a broad range of social programs, belonging to different agencies and ministers of the national and provincial governments, aiming to address populations like the indigenous communities in El Impenetrable. The national Ombudsman (in its legal complaint against the national and provincial government) listed some of these programs: PRODERNA (*Programa de Desarrollo Rural de las Provincias del Noroeste Argentino*); PROINDE (*Desarrollo de Pequeños Productores Agropecuarios*); PSA (*Programa Social Agropecuario*); *Ayuda Social a Personas*; *Plan Nacional de Seguridad Alimentaria* and others.[55] Arguably, the existence of these programs indicated that the national and provincial states have already assumed some sort

[55] Item IV 3 of the legal compliant filed by the national ombudsman.

of legal or at least policy commitments to provide support and assistance to those communities.

Secondly, although the governments (especially the provincial administration of Governor Roy Nikish) did not fully respond to the social demands for larger and better public intervention to address the crisis, the governments did not deny the existence of legal and policy mandates to provide social and health aid and support to the communities. This is an important point in relation to the policy loser argument. It makes evident that the indigenous groups and its allies were demanding the implementation or enforcement of policy goals and measures that were already approved through the policy making processes and, hence, were already part of the existing legislation.

The second factor to be analyzed is the political leverage of the involved social groups. Historically, indigenous communities in Chaco have had limited capability to access the state and to influence public policy. Indigenous collective action has been characterized by fragmentation and division, especially along the main ethnic groups: Tobas, Wichis, and Mocovies.[56] Clientelistic practices from the state have further conditioned the capacity of indigenous communities and organizations to articulate collective policy demands. This picture seems to begin to change during the last few years. In 2006, for instance, Chaco experienced massive indigenous protests –known as The Uprising (*"El Levantamiento"*) due to claims for land tenures rights and other policy measures.[57] However, the health and food crisis that hatched out during the winter of 2007 did not trigger massive indigenous mobilizations or protests. Arguably, the directly

[56] Interview with Licenciada Adriana Viñas (Buenos Aires, July 10, 2008).

[57] *El Levantamiento*, which lasted for almost 100 days, included a massive indigenous mobilization to the capital city of Resistencia (May 31, 2006), and the camping for almost two months of several hundred of indigenous people in front of the governor's house. The protests included communities and organizations from the three main ethnic groups (see coverage of Página 12, from May to August 2006).

affected communities in El Impenetrable were concerned with daily survival, and did not have the resources to organize and pose collective demands on the state. In this context, the IDACh, NGOs and other institutions working on indigenous issues were the main forces behind the social demands around the health and food crisis. For instance, the report produced by the local NGO Centro Mandela during the last months of 2006 is considered to have triggered the public alert about the health situation in the indigenous communities (see above, footnote 40). Similarly, IDACh played a main role promoting and sustaining the social demands for government intervention to address the crisis. The involvement of the national Ombudsman office, in its term, was critical to gain access to the Supreme Court. However, the key factor in the process of building up the social demand over this issue was when the national media began to intensively covering what was happening in Chaco. From that moment on, the health and food crisis affecting the indigenous communities in El Impenetrable became an issue of national attention that the governments could not ignore nor treat lightly. In short, the affected population by the health and food crisis was politically disadvantaged, without much capacity of social mobilization and limited access to the state, although the IDACh, local NGOs and other allies triggered and sustained the social concerns and demands about the situation affecting these communities, and media coverage definitely helped placing the issue in the public agenda.

In relation to the legislature, even though it did not play a main role in the policy debate around the health and food crisis, the provincial assembly was relatively attentive to the issue. Chaco has a unicameral legislature composed by 32 legislators. At that time, the governing coalition (UCR and its allies) controlled the assembly with 18 legislators (56% of the legislature), while the main opposition party, the Peronist party, had 11

legislators.[58] During that winter of 2007, the opposition proposed three resolutions dealing with the health and food situation of the indigenous communities of Chaco. Two of the proposed resolutions called the provincial government to increase the social aid to the communities and to improve the coordination with the national government.[59] These proposals were integrated in Resolution 818/07 which, with a somehow softer language, was unanimously approved by the legislature.[60] The third proposed resolution asked the provincial government to declare the indigenous communities of Chaco in social emergency.[61] To justify this proposal, the opposition stressed the weak implementation of the existing state programs and the need for the government to prioritize the critical situation affecting the communities and re-direct its available resources to that end.[62] The proposed resolution was discussed in the plenary of the assembly, but it was not supported by the party of government and, therefore, was not approved. The government legislative block basically argued that the executive was already taking measures to address the crisis; the declaration of emergency, then, was a politically motivated proposal of the opposition in the context of the electoral campaign.[63] Regardless of the legislative outcome, the legislative debate shows that the provincial assembly was relatively attentive to the issue and, to some extent it fulfilled its role of overseeing the government's policy on the matter.

---

[58] The other three legislators each belonged to different opposition parties.

[59] Resolution proposals 1051/07 and 1052/07 submitted by legislator María Elena Vargas (PJ)

[60] See the legislative record of the Chaco's House of Representatives (Versión Taquigráfica de las Sesiones de la Cámara de Diputados 2007 (c), 61)

[61] Resolution proposal 1049/07 also submitted by María Elena Vargas (PJ)

[62] See statement of legislator Vargas (Versión Taquigráfica de las Sesiones de la Cámara de Diputados 2007 (a), 72-79)

[63] As mentioned earlier, in September 2007, Chaco was holding legislative and gubernatorial elections. See statements of legislators Lizárraga, Siri and Aguero (Versión Taquigráfica de las Sesiones de la Cámara de Diputados 2007 (b), 103-118).

In relation to the role of the executive branch of government, there were important differences regarding the way the two involved provincial administrations (the administrations of Governor Nikish –UCR- and Governor Capitanich –PJ-) addressed and dealt with the health and food crisis that affected the indigenous communities in El Impenetrable. However, the fact that the issue continued to be judicialized despite of the change of government (and the change of policies) shows that the role and the policy preferences of the executive were not a critical factor in the judicialization of this dispute. As described above, the administration led by governor Nikish was not very accessible to the demands of the indigenous rights groups. Its initial response was to deny the existence of a health crisis in the region. Nevertheless, the Nikish administration did take some measures to address the situation, even though they were considered largely insufficient by the indigenous groups and its allies. The judicialization of the conflict began during this period. In its turn, the administration of governor Capitanich was much more accessible to the indigenous groups. As it was also explained above, the new government immediately took measures to address the crisis affecting the indigenous communities in El Impenetrable. In this context, one would have expected the process of judicialization to stop or, at least, that the judiciary would have become a far less relevant venue for the unfolding of the policy process and negotiations. However, despite of the new measures, the situation in the communities did not improve significantly, and hence, the process of judicialization continued. In sum, there were clear differences in the way these administrations dealt with the health and food crisis, even though both administrations took some type of policy measures to address the situation. Nevertheless, the relevant point for our analysis is that the judicialization of the public policy towards the indigenous communities in the Chaco continued, despite of the change of government and the differences between the two administrations.

In contrast to the role of the legislature or the executive, issues of state capacity were a major factor affecting the process of judicialization of this policy. As explained before, the main social and political demands regarding the health and food crisis affecting the indigenous communities were not related to the enactment of new policies or laws but rather to the effective implementation of existing policy goals and mandates. In this context, several reports from institutions and individuals working in the field clearly described and illustrated how the lack of policy implementation was mainly related to different deficiencies of the state apparatus. Poor infrastructure of the public health system and lack of trained human resources to provide health care to indigenous communities, were some of the main weaknesses often mentioned by these different actors. See, for instance, the following extracts from the report prepared by the Pan American Health Organization mission (2008, 3-5) about the situation of the public health care system serving El impenetrable (own translation from Spanish):

> *...The provincial government does not have enough professionals to extend these measures [the health emergency measures taken by the new administration of Governor Capitanich] to other towns of El Impenetrable. Therefore, the emergency measures have been focalized in only one town…*
> *...[in relation to human resources] at the first level of the health care system, there are only 16 interns…each one receive a salary of $365 [around 100 US dollars at that time] to attend 700 scattered families...*
> *...there is no infrastructure in the health sector or in social services to distribute food in the area. In Castelli, for instance, there is only one warehouse to store food…*
> *…the infrastructure deficit in the health sector is very important at all levels….It is necessary to build a new hospital in Castelli to provide service to the population living in El Impenetrable…"*[64]

[64] In relation to the existing Hospital in Castelli, see the media interviews with Rolando Núñez, director of Centro Mandela (own translation from Spanish): *"...the sick aboriginal people do not want to go to the Castelli Hospital, because they know that once they get in that place, they die…the network of health care centers of El Impenetrable as well as the Castelli hospital are not useful any more…the Castelli is not a hospital, it is just a shell…"* (Clarín, "La Corte insatisfecha", November 7, 2007). *"...That hospital [Hospital Castelli]would not be functioning if were subject to inspections using the basic biosafety*

Another problem often mentioned by different actors was the weak coordination between different agencies and programs of the national and provincial governments. For instance, the public statement made by ENDEPA (the agency of the Catholic Church for indigenous issues) specifically mentioned this issue (own translation from Spanish):

> *…[the indigenous people]are not treated on time and properly by the public health system; social aid, health care and food programs only partially reach them, and the different state agencies work isolate from each other and many time their relations are characterized by struggle and competition…*[65]

The need to improve coordination and implementation was also a main problem stressed during the legislative debate to declare the health and social emergency. See for instance, the following brief extract from the statement made by legislator Vargas, the main speaker of the Peronist legislative block on this matter (own translation from Spanish):

> *…The province of Chaco has many programs targeting population in situations of emergency…[but] they are badly articulated and badly implemented. ..Resources are being wasted and people is dying for lack of health care and chronic diseases like ..malnutrition… tuberculosis…"*(Versión Taquigráfica de las Sesiones de la Cámara de Diputados 2007 (a), 76).

In short, the weaknesses of the provincial state apparatus to intervene in the area, plus the fragmentation of the state efforts and the lack of proper coordination, severely limited the potential impact of any policy aiming to address the urgent needs of the indigenous communities of El Impenetrable. Moreover, this inability of the state to

---

standards that are applied to any health center…it is located over a huge cesspool, it does not have an autoclave, it does not have a pyrolytic oven [for hazardous waste treatment]…the tisiology center is not working –even though this area has the highest concentration of population with tuberculosis in Argentina-…, the neonatology center does not function either, they incorporated some modern technical equipment but they do not have trained people to use them..." (Argentina Indymedia, http://argentina.indymedia.org/news/2007/09/545911.php, September 8, 2007).

[65]Cited by Diario Norte ("La Pastoral Aborigen responsabiliza al gobierno por la situación indígena", August 8, 2007).

effectively intervene in the field was relatively autonomous from the changes in the policy preferences of the politicians in charge of the executive. As explained before, the administration of Governor Capitanich (PJ) was much more open and active regarding the crisis than the previous administration of Governor Nikish (UCR). However, the Capitanich administration was also unable to improve significantly the situation in the field.

In sum, a deficient state apparatus, with limited capability to fulfill existing policy mandates, led to a process of judicialization of the health and food crisis affecting the indigenous communities of El Impenetrable, even in a political context where the legislature and the executive were relatively attentive to the issue.

TREATMENT AND MEDICINES FOR PEOPLE LIVING WITH HIV- AIDS

During the 1990s, several laws and regulations were passed at the federal level, establishing a national policy in relation to HIV/AIDS. The cornerstone of this policy was the law 23.798/90 approved with broad political support by the Argentine congress. This norm declares *"the fight against [AIDS] of national interest"*, which includes the diagnosis and treatment of the illness, its prevention as well those measures aiming to avoid the spreading of the disease (article 1). Furthermore, the law establishes the national ministry of health as the authority in charge of its application in the whole territory of Argentina (article 3). The national government at the time –the administration of President Menem- relatively supported the new legislation.[66] The government was

[66]At that time, the party of the executive also controlled the national congress. The Peronist party held around 60% of the Senate seats and 49% of the seats in the House of Representatives (in the House, the Peronist party easily reached legislative majorities with the votes of some of the provincial parties or smaller national parties).

reluctant to take measures in relation to HIV/AIDS prevention, particularly in relation to the promotion of the use of condoms (See Bianco et al. 2003, 45-46), but it took measures to implement the legislation approved by congress in general. In 1992, the government –through the ministry of health- created the National Program against The Human Retrovirus and AIDS (Resolution 18/92), which was in charge, among other tasks, of the purchase and provision of the medicines and drugs needed for HIV/AIDS treatments.[67] In 1994, the ministry of health established by Resolution 169/94 the "Vademecum to treat HIV/AIDS patients", which listed the medicines to be provided. These medicines and treatments were supplied free of charge to those people who did not have social security or means to afford private medical coverage. [68]

By the middle of the 1990s, the development of new drugs and medicines for HIV/AIDs had profound implications for the public policy on this matter. In the XIth International AIDS Conference held in Vancouver (July 1996), researchers presented the positive results of a therapy based on the combined use of antiretroviral medicines and protease inhibitors. The auspicious results of the tri-therapy (also known as the AIDS cocktail) were widely and quickly spread among the Argentine community involved with HIV/AIDS issues. By the end of 1996, ANMAT, the state agency responsible of monitoring the quality of medical products, had authorized the use of the new drugs in Argentina, which were later added to the vademecum to treat HIV/AIDS. However, the

[67] The Program carried out several others tasks, including research, prevention and information. For a more detailed analysis of the program and its evolution see Fairstein and Zimerman (2005).

[68] At this point, it is worth to give the reader some basic information about how healthcare is organized in Argentina. The Argentine healthcare system is constituted by three subsectors: social security, private medicine and the public health sector. The social security sector basically covers employees and their families through institutions managed by each trade union. The private sector encompassed individual practitioners, hospitals, clinics and varied forms of private medical insurance. The public sector is made up of public hospitals (under provincial and municipal authority). In principle, this sector offers free health services to the whole population, but in fact, it mainly serves the poorest sectors of argentine society, those who do not have social security medical coverage and cannot afford private health services. For a brief but more detailed description of the Argentine health care system, see Fairstein and Zimerman (2005).

costs of the try-therapy were substantially higher.[69] Moreover, their good results triggered an increase in the number people seeking treatment. In this context, NGOs and groups of people living with HIV/AIDS alerted that the available public budget was insufficient to meet the higher costs and lobbied the national government and congress to add more funds for HIV/AIDS (Bianco et al. 1999, 30-31). However, their efforts were unsuccessful and the budget, at that time, was not increased.

Meanwhile, the state' system of distribution and provision of medicines suffered multiple problems. The National Program Against AIDS envisaged a mechanism of distribution through the health authorities of the different provinces and the city of Buenos Aires. However, there were serious problems of coordination and communication between the different health authorities. In parallel, the national health minister began drawing up lists of the people who could receive the new drugs. The medicines had to be pick up at the ministry's headquarters located in the city of Buenos Aires. This mechanism created a huge tension and competition among people living with HIV/AIDS to be included in those lists. It clearly favored those living in the Buenos Aires region to the detriment of the rest of the country, and especially those who were well connected or informed (Bianco et al. 2003, 46). Furthermore, shortcomings or delays in the provision of medicines became very usual due to lack of sufficient stock as well as for diverse problems in the state procedures to purchase the medicines or other operational problems. In this context, the protests of NGOs and people living with HIV/AIDS increased.

By the end of 1996, eight NGOs belonging to the Network of NGOs working on HIV AIDS (*"Encuentro de ONGs con Trabajo en VIH/SIDA"*) submitted a joint *amparo* against the national ministry of health at a federal district court ("Asociación Benghalensis y otros c/Ministerio de Salud y Acción Social -Estado Nacional s/amparo

[69] According to various sources, the cost of the treatment was approximately between U$1000 to U$1200 a month (see, for example, La Nación, "El SIDA creció más entre mujeres y niños", November 30, 1996).

ley 16.986 ").[70] The plaintiffs basically asked the judge to order the national government to provide medical treatment and medicines to people living with HIV/AID registered at hospitals and other health entities, in accordance to law 23.798 and several general constitutional provisions. Furthermore, as a provisional remedy, they asked the court to order the national government to deliver the medicines that had been required by provincial and municipal health programs and for individuals. Few days later, the federal district court granted the provisional order after confirming the lack of medicines in some public hospitals.[71]

The national government, then, took measures aiming to improve the provision of the medicines and treatment for HIV/AIDS. By the middle of 1997, the government increased the HIV/AIDS budget for that year from $19 millions of pesos to $54.7. For the year 1998, the budget was further increased to 77.06 millions.[72] The government also changed the system of purchase and distribution of the medication for HIV/AIDS. By resolution 346/97, the ministry of health de-centralized the distribution of medicines based on the demand reported by the public hospitals and other entities where treatments were provided. The purpose was to optimize the provision of medication, avoiding the need of the patients to go to the national ministry to get their drugs.[73] Furthermore, the ministry signed agreements with provincial health ministries, committing itself to provide the drugs and medicines to treat the people living with HIV/AIDS reported by each province (Bianco et al. 1999, 13).

---

[70] The *amparo* was submitted at the Juzgado Nacional de 1ra. Instancia en lo Contencioso Administrativo Federal Nro. 3, judge Claudia Rodríguez Vidal.

[71] For instance, the court contacted the Garrahan Hospital to learn if they had enough medicines to treat AIDS. The Hospital reported that they were lacking stock of different drugs (report cited by Maurino et al. 2005, 137).

[72] Data from the national ministry of health (cited by Bianco et al. 1999, 30).

[73] Later, the ministry passed resolution 763/98, which established that the medication could be also obtained at the ministry's headquarters, until the hospitals' requests were fulfilled.

The budget increase helped alleviating the shortage of medicines. However the delays in the distribution and other operational failures continued to affect the timely and regular provision of medicines. Hospitals did not receive the drugs on time, or in sufficient quantity to attend the demand, or received certain drugs and not others.[74] A good indicator of the problems with the provision of HIV/AIDS medication at the hospitals was the increasing number of people trying to obtain their drugs directly from the national minister of health. Just as an example, in July 1998, 400 persons received their medication at the headquarters of the health minister; by December 1998, that number increased to 1600.[75]

In this context, the process of judicialization continued. As evidence of the lack of provision of HIV/AIDS medicines, the plaintiffs offered the administrative claims submitted by AIDS patients to the health minister as well as reports from several public hospitals and from the health authorities of the province and the city of Buenos Aires. In turn, the government basically responded that it met its obligation under law 23.798, since it had implemented a national AIDS program. Furthermore, it argued that the program had delivered all the medicines that were required by the different sub-national jurisdictions.[76] In February 1998, a little over a year after the beginning of the judicial procedures, the district court issued its final ruling. The judge considered proved that the medication was not being provided in a regular and timely manner, and ordered the ministry of health to comply with its obligations under law 23.798, to assist and treat AIDS patients registered in hospitals and health centers throughout the country. The government appealed, first to the Federal Court of Appeal, and then to the Supreme

---

[74] See, for instance, La Nación ("Enfermos de SIDA reclamaron drogas. Dialogo en el Ministerio", February 10, 1998).

[75] Data elaborated by the national minister of health (cited by Bianco et al. 1999, 23).

[76] In other words, the national government's response suggested that if AIDS patients were not receiving the medicines, was because the sub-national jurisdictions were not making the proper requests.

Court. On June 2000, the Supreme Court upheld the judicial resolution of the district court, closing the case.[77]

By the time the Supreme Court took its decision, a new political coalition – the Alianza- was in charge of the national executive.[78] The new government did not go back on the measures taken by the previous Peronist's administration regarding the provision of HIV/AIDS medication.[79] In fact, the Alianza's public budget was rather similar.[80] Furthermore, the new administration also carried out several organizational and operational changes aiming to improve the system of distribution and purchase of medicines (see Bianco 2006). However, problems and delays in the provision continued to happen, even though not in the scale of the years 1996-1997.[81] And as result, AIDS patients regularly resorted to litigation to obtain their medicines from the state, either individually or in groups. In short, the pattern of problems in the provision of medicines / judicialization of demands continued and, arguably, it became a rather standard feature of HIV/AIDS policy in Argentina.

---

[77] For a more detailed overview of the legal proceedings, see Maurino et al. (2005, 135-147).

[78] The Alianza was a political coalition formed by the UCR and the FREPASO. Fernando de la Rua, the presidential candidate of the Alianza defeated the Peronist candidate, Antonio Duhalde, in the presidential election of 1999. De la Rua took office on December 1999.

[79]There were, however, other HIV/AIDS issues in which there were important policy differences between the two administrations. For instance, the government of the Alianza placed more emphasis on HIV/AIDS prevention than the Menen' administration (See Bianco et al. 2003, 45-49).

[80] The HIV/AIDS budget was almost $88 millions of pesos for the year 1999 (it was $77 millions in 1998, the last year of the Menen's administration), $69.7 million for the year 2000 and $65 million for the year 2001. Even though there was a budget reduction during the last 2 years of the Alianza's administration, these budgets were still far larger than the budgets assigned for HIV/AIDS before 1997 (data from the minister of economy cited byFairstein and Zimermam 2005, 38).

[81] For instance, during the year 2000, the health minister had to resort to parceling out the dosages of medication in smaller rations due to problems with the drug companies supplying certain medicines. Patients had to return every five days to pick up their medication which were often distributed in simple plastic bags and after long hours of waiting (See Centro de Estudios Legales y Sociales -CELS 2001, 193).

Analysis of conditions triggering judicialization

As in the previous case, the first issue to analyze is whether the social actors demanding the government to provide HIV/AIDS treatment and medicines were "losers" of the policy process. One can argue that they were policy losers because their demand for budget increase was not satisfied immediately, but after the conflict was judicialized. However, such assessment is too narrow and it does not pay attention to the development, as a whole, of the policy on public health coverage of HIV/AIDS. First, the political system has already approved a strong legal instrument, law 23.798, establishing relatively clear legal and policy mandates on the state towards the population living with HIV/AIDS. Furthermore, the national government took some important legal and policy steps to fulfill those mandates. As mentioned earlier, by Resolution 18/92, the government created a national program against AIDS; by Resolution 169/94 it established the vademecun of medicines and drugs that should be supplied to HIV/AIDS patients, and when the new drugs and medicines appeared in the market in 1996 (the "cocktail"), they were also added to the vademecum. All these were concrete legal and policy measures taken by the government to provide treatment and medicines to people living with HIV/AIDS. Clearly, they also indicated that the social demand for public health coverage of HIV/AIDS was not a "loser" of the policymaking process at all; these actors were essentially demanding the implementation of policy mandates and goals already approved by the political venues.

In relation to the political leverage of the associations and groups working on HIV/AIDS, these social actors were able to access and be part of the policy making processes and debate. In fact, civil society organizations were a main force helping to place the issue of HIV/AIDS in the policy agenda in Argentina. For instance, some NGOs

were active players in the making of important pieces of legislation such as law 24.455/95 on social security coverage for AIDS patients and drug addicts and also law 24.754/96 which requires private medical insurance to provide treatment and medicines to people living with HIV/AIDS (Bianco et al. 1999, 14-15). They also actively advocated for increases in public funds for HIV/AIDS. Indeed, when the budget was discussed at the Congress in 1996, NGOs and people living with HIV/AIDS took part in the meetings and expressed their concerns that the funding approved would be insufficient to meet the medication demands and the costs of the new therapy (Bianco et al. 1999, 30-31). Furthermore, the struggle of people living with HIV/AIDS to obtain their medicines received significant media coverage during 1996 and 1997. The main national newspapers had stories about the lack of medicines in public hospital, long waiting lists, interruption of treatments, etc, all of which arguably help raising public opinion attention and placing the issue on the public agenda.[82] In sum, the social actors demanding health coverage for HIV/AIDS were not politically disadvantage. On the contrary, they were able to access and take part of the policy processes and debates.

The national Congress, in its turn, played a relatively significant role in the policy processes and debates about healthcare and HIV/AIDS. During the 1990s the national legislature passed, besides law 23.798/90, the two other main legal instruments already mentioned in the previous paragraph, which finished structuring the coverage of the Argentine health care system in relation to HIV/AIDS. Law 24.455/95 establishes that the social security system ought to provide medical, psychological and pharmaceutical treatment to people infected with AIDS. A year later, Congress approved law 24.754/96,

[82] See for instance, coverage of La Nación ("Prometen que no faltará una droga contra el HIV", March 7, 1997; "Continúa la escasez de remedies para el SIDA", April 5; "Problemas con las drogas para el SIDA", July 25; "Más de 6500 pacientes esperan su droga", September 10, 1997).

which states that private medical insurances schemes are also obliged to provide treatment and medicine to people living with HIV/AIDS. Despite of strong opposition from the *"obras sociales"* belonging to the unions and from private health insurances, these laws were approved with broad political support. Both, the party of government -the Peronist party, and the main opposition parties -the UCR and FREPASO, supported them.[83] Furthermore, the Congress also took some oversight measures in relation to the government' actions and policies on HIV/AIDS. During 1996-1997 there were several resolutions approved in the Senate and in the House of Representatives related to the provision of the new drugs and funding for HIV/AIDS.[84] In sum, all these indicate that the national Congress was not passive in relation to the healthcare coverage of HIV/AIDS, but rather attentive and involved in the policy developments and debates on this matter.

In relation to the role of the executive, even though the Menem administration initially refused to increase the HIV/AIDS budget, the government was not opposed to the policy of providing treatment and medicines to people living with HIV/AIDS established by law 23.798/90.[85] Two main reasons justify this assessment. First, before the conflict was judicialized, the government took important and concrete measures

[83] As another indicator of the broad political support, it is worth noting that in the case of law 24.754, the bill was presented by congresswomen Moreau (UCR) and co-sponsored by two Peronist legislators.
[84] Just as an example, on September 1996, the House of Representatives approved a resolution requesting the executive to approve the drug Nevipravina to treat HIV/AIDS (see the online database of the Cámara de Diputados de la Nación Argentina, file 3390-D-96). This resolution was co-sponsored by legislators from the Peronist party and from the FREPASO. In the same session, the House also approved a resolution, proposed by legislators of the UCR, requesting the executive to inform about the delay in the provision of medicines free of charge to people with HIV/AIDS (see online database, Cámara de Diputados de la Nación Argentina, file 4510-D-96).
[85] It is worth stressing that we are referring specifically to the government positions about the policies established by the law 23.798 in relation to the provision of treatment and medicines. As explained earlier, the Menem administration had a more ambivalent attitude regarding HIV/AIDs prevention and information policies, and it was clearly opposed to the promotion of condoms (Bianco et al. 2003).

implementing law 23.798, such as the creation of the AIDS national program and the development of the vademecun of medicines to treat HIV/AIDS. Second, despite its initial rejection, the Menem government substantially increased the budget for 1997, and then for 1998. It also modified the system of distribution aiming to strength the provision of the medicine at the public hospitals where treatment was provided. If the policy preferences of the government had been clearly opposed to those of the law 23.798, it is difficult to understand these decisions to increase the budge and reform the mechanisms of distribution of medicines even before the district court issued its final judicial resolution. In short, HIV/AIDS issues might not had been a priority of the Menem administration health policies, but the government was not openly opposed to the policy of providing medicines and treatment for people living with HIV/AIDS, and in fact, took measures to implement law 23.798. In this context, the initial rejection of the Menem administration to increase the HIV/AIDS budget during the second half of 1996, helped bringing this issue to the judiciary, but it cannot explain the continuous judicialization of this policy.

The capability of the state apparatus, in contrast, was clearly a main factor negatively affecting the implementation of the HIV/AIDS policies and, hence, "feeding" the judicialization of the demands for medication. As explained above, despite of the budget increase, problems in the provision of drugs and treatments continued to happen. Weak communication and coordination between the national minister and the sub-national health authorities was a common problem affecting the distribution of medicines.[86] The following dialogue transcribed by the newspaper La Nación, between

[86] The public hospital system in Argentina was decentralized in the 1990s. Therefore, hospitals and health centers were now run by the provinces and the city of Buenos Aires, and not by the national ministry of health.

public officials and representatives of NGOs who were claiming for the lack of medicines in public hospitals, is very illustrative of the problems in the state mechanisms of distribution (own translation from Spanish):[87]

> ***Leppen*** *(Director, Minister of Health): Give us the list with the name of the patients who have problems…*
> ***Lorenzo Vargas*** *(NGO): These are not isolated cases. There are no drugs in San Isidro, Escobar, in the Ramos Mejías Hospital and in several provinces…*
> ***Leppen****: We deliver the drugs as we get the requirements from the health centers, and to be sure that the drugs reach the places they are supposed to, we are auditing the health regions…*
> ***Vargas****: For the last two years you have given us the same answer, and in the hospitals, they say it is your fault…*
> ***Bourgeols*** *(Chief, Medicines Delivering Program, Minister of Health): But, we are delivering all the supplies we are being asked for…*
> ***Vargas****: Then, something is wrong in the monitoring system, because the figures you have do not reflect what we see. Someone must be taking the medicines that are missing…*

Interruptions or delays in the provision of the medication were also often related to problems in the state procedure to purchase the medication. Following, I quote a short paragraph of an interview with Dr. Pedro Cahn, Chief of Infectology at the Fernandez Hospital and one of the most well known and respected medical experts on HIV/AIDS in Argentina, who vividly explained some of the bureaucratic problems facing the implementation of HIV/AIDS policies in Argentina (interview published by La Nación, own translation from Spanish): [88]

> ***Journalist****: What is true about the complaints that there is a lack of medicines for the treatment? A problem that Minister [of Health] Mazza denies*
> ***Dr. Cahn****: Well, look, historically, always there was a lack of enough medicines. Sometimes, because there was no budget, other times, like now, because the minister of health buys the medicines with the same procedures and sensitivity they buy pads of paper; they call for a bid to buy paper, and the companies A*

[87] La Nación ("Enfermos de SIDA reclamaron drogas. Dialogo en el Ministerio", February 10, 1998).
[88] La Nación ("Si hay plata para un aeropuerto en Anillaco, tiene que haber para el SIDA", September 28, 1997).

and B take part of the bid, and when A wins, B challenges the bid. Then, the procedure is suspended, an auditor's office gets involved, and after 3 months, someone finally says that company A was right…. When this happens with paper pads, one can manage the situation somehow. But when this happens with the medicines, the virus does not stop growing…So, first, [the state] does not work with a critical stock, and second, the patients have to go through an enormous amount of bureaucratic procedures [to get the medicines]...

Other times, interruptions or delays were due to the problems with the private suppliers of medicines. A repeated situation was that pharmaceutical companies responsible for supplying the government with AIDS drugs failed to meet their contractual obligations, causing interruptions in the provision of the medication to the patients, which also outlined the lack of proper state control over these companies.[89]

In short, there was a deficient state apparatus which was ill prepared to effectively implement the policy mandates and goals established by the HIV/AIDS legislation. Furthermore, the fact that delays and interruptions in the provision of medication continued during the administration of de La Rua (Alianza) outlines that the problems in the implementation of the policy were mainly related to problems of state capability rather than to the policy preferences of those in charge of the executive branch of government.

A VACCINE FOR THE "MAL DEL RASTROJO"

The Argentine Hemorrhagic Fever (AHF), locally known as *"mal de los rastrojos"*, is an infectious disease that affects mainly agricultural workers and rural

[89] See, for instance, the report on La Nación about the lack of AZT due to problems with the drug company ("Prometen que no faltará una droga contra el HIV", March 7, 1997). See also Bianco et al (1999, 24) in relation to similar problems in the provision of Ritonavir during 1998. Also in 2000, the government resorted to parceling the dosages due to problems in the supply by the drugs companies (Centro de Estudios Legales y Sociales -CELS 2001, 193).

populations in an endemic central region of Argentina.[90] The development of the disease is very fast and acute (1-2 weeks) and without proper treatment, its case-fatality ratio is very high (15-30%). Between 1958 (when it was first identified) and the beginning of the 1990s (when the vaccination campaigns began), there were over 20.000 reported cases of AHF. According to the experts, the most efficacious preventive measure is the application of a vaccine called Candid 1 (Maiztegui et al. 1998). This case is the story of the policy process that led to the local production of that vaccine in Argentina.

In 1978, with the support of UNDP and the PAHO, the Argentine government (at that time under a military dictatorship) and the USAMRIID (Army Medical Research Institute of Infectious Diseases) began a research project aiming to produce a vaccine against AHF.[91] The research results were successful and by 1990 the vaccine, Candid 1, was ready. Through a contract with the USA State Department, the Argentine government (at that time, already under the administration of a democratically elected president, Carlos Menem) acquired 340.000 doses of the vaccine produced from the Salk Institute, and by 1991, it began the first vaccination campaigns among the risk population.

The production of Candid 1, however, was problematic. It was considered an "orphan vaccine" and hence of little commercial value for the private pharmaceutical industry.[92] In the 1980s, then, Argentina began the slow construction of a high security laboratory at the National Institute of Research on Hemorrhagic Virus (*Instituto Nacional de Estudios sobre Virosis Hemorragicas*) - INEVH, with the purpose of producing the

[90] The qualification of "Argentine" to this type of fever is due to the fact that the disease only occurred in this country. Other countries and geographical areas are affected by similar hemorrhagic fevers but they are caused by different virus.

[91] For a brief overview of the history of the research efforts to produce a vaccine against AHF see the web site of INEVH (http://www.fundacionmaiztegui.org.ar/1024x768/Marcos/INEVH/Marcos/Total.htm.)

[92] The term "orphan vaccines" refers to vaccines in which the costs of production surpass the potential sales, and therefore the private industry is generally not interested in producing them.

vaccine. The project was promoted by a well known Argentine scientist, Dr. Julio Maiztegui, with a strong support of the research community and local actors from the communities affected by the disease.[93] However, the project was advancing extremely slow and without enough public financial support. As one would expect, after the successful creation of Candid 1 and the first vaccination campaigns, the demands to produce the vaccine in Argentina grew. In 1991, the national Senate and the House of Representative approved several declarations and resolutions requiring the executive branch of government to provide funds for the construction of the laboratory and for the production of the vaccine. In spite of these efforts, however, the pace of the project did not change substantially.

By 1996, the public health situation around AHF worsens. There were only 80.000 vaccines left, from the stock acquired in 1991, to attend a potentially risk population of approximately 3.5 million people. That year, then, the vaccination campaigns against AHF were cancelled in order to save the remaining stock for emergency situations. Some national newspaper covered the story, which was an important development since the issue had been absent in the national media. Furthermore, that same year, an outbreak of Hantavirus (a deadly infectious disease) in the southern part of Argentina generated a lot media coverage, which also helped raising some public attention about the health risks posed by infectious diseases in general, but especially AHF.[94] Congress also began paying some attention to the issue again. Several

[93] At the beginning of the 1980s, farmer organizations, local business and other local groups formed an association to support the construction of the laboratory and more generally the work of Dr. Maiztegui and his group of researchers. Later, during the 1990s, they helped creating the Foundation Dr. Julio Maiztegui for Regional Scientific and Technological Research (*Fundación Dr. Julio Maiztegui para el Desarrollo Científico y Tecnológico Regional*). The construction of the laboratory and the production of the vaccine Candid 1 were two of the main objectives of the creation of the Foundation (see website of Fundación Maiztegui, http://www.fundacionmaiztegui.org.ar/800x600/Marcos/Total.htm) .

[94] Due to the Hantavirus outbreak, the director of INEVH, Delia Enria, as well as other researchers, was interview many times during those months. They took full advantage of that media exposition to stress the

resolutions were approved in the House of Representative and the Senate, with broad political support, asking the national government to inform about the advances in the construction of the laboratory and to support the local production of the vaccine. In that context, the national Minister of Health announced a budget increase for AHF for the year 1997.

Meanwhile, the CELS, a well known Argentine NGO specialized on human rights litigation, become involved in the AHF vaccine issue. Triggered by the media reports about the cancellation of the vaccination campaigns, the CELS contacted researchers at the INEVH and gathered information about the lack of advances in the local production of Candid 1.[95] A main piece of evidence was a report prepared by the Director of the INEVH, Delia Enria, which stated that there had been no public funding available for equipment and for the construction of the laboratory during the last two previous years.[96] By the end of 1996, CELS filed a "*recurso de amparo*" against the national government at a federal district court ("Viceconte, Mariela Cecilia c/Estado Nacional -Ministerio de Salud y Acción Social- s/ amparo ley 16.968").[97] The plaintiff basically asked the court to order the national government to take urgent measures to complete the production of the vaccine Candid 1 and to provide it to the population under risk. The district court rejected the claim arguing that the government had already taken policy measures to that end,

---

risks to public health posed by AHF and the problems they were facing to combat it (interview with Victor Abramovich, Buenos Aires, August 12, 2008).

[95] At that time, CELS was analyzing the possibility of bringing a collective legal claim based on the constitutional right to health. It was not clear that such a right was included in article 43 of the Argentinean constitution reformed in 1994, and CELS's attorneys were looking for cases that allow for making such a claim before a court of law. When they learnt from the newspapers about the cancellation of the vaccine campaign against AHF, CELS got in contact with the actors involved in this policy issue. For CELS, then, this was the case of strategic litigation that they were looking for to advance the judicial recognition of the right to health (interview with Victor Abramovich, Buenos Aires, August 12, 2008).

[96] This report is later cited in the sentence of the court of appeals on Vicenconte c/ Estado Nacional (see item XV of the resolution of June 2, 1998).

[97] Mariela Viceconte was a student at the law clinic run by CELS and the School of Law of the University of Buenos Aires, and a resident of Azul, a city which was located in the AHF endemic area (Centro de Estudios Legales y Sociales 2008, 69).

namely the budget increase. Indeed, during the judicial procedure the health minister confirmed that funds had been assigned to INEVH in the 1997 national budget to finish the construction of the laboratory. Nevertheless, CELS and the national Ombudsman (who, by that time, was also a legal party in the judicial case) appealed the resolution to a higher court.

In June 1998, after assessing the development of the project to produce the vaccine, a federal court of appeals (*Camara Nacional de Apelaciones en lo Contencioso Administrativo Federal, sala IV*) revoked the decision of the district court. The court of appeals affirmed that the Argentine government had clearly assumed a legal commitment to produce the vaccine against AHF, but that obligation was not being fulfilled. The court's resolution described that 80% of the production technology and quality control processes needed to produce the vaccine were finished, but the laboratory and technical equipment were far from ready, regardless of the budget increased (see item XIII of the court's resolution). The court of appeals, then, concluded by ordering the government to produce the vaccine according to a schedule prepared by the INEVH.

A year and a half later, in July 2000, the schedule approved by the court was overdue and the vaccine was still not ready. The plaintiff, then, requested a district court to enforce the court of appeal's resolution.[98] At that point, there was a new administration in charge of the national executive. The Alianza, an electoral coalition between the UCR and FREPASO, had defeated the Peronist party in the presidential election of 1999. The new president, Antonio de La Rua, had taken office in December of 1999. In its response to the plaintiff's claim, the new government stated that the vaccine could not be produced according to the schedule. The judge, then, applied a fine to the minister of health for the

[98] For a brief but detailed legal overview of the stage of judicial enforcement of the court of appeals' resolution (*ejecución de sentencia*, in Spanish) see Maurino et al. (2005, 177-122).

lack of compliance with the court's resolution.[99] The government appealed and the case went back to the court of appeals.

In 2001, the court of appeals convened to a public hearing with the different states agencies involved in the process with the purpose of identifying the obstacles hindering the production of the vaccine. In the hearing, there were strong disagreements between the different agencies about the steps needed to finish the production of the vaccine (Maurino et al. 2005,117; also Cerro 2007). The court of appeal, then, convoked the Minister of Health Hector Lombardo, in person, to clarify the situation. Lombardo was very skeptical about the effectiveness of the vaccine and did not entirely support the project.[100] Nevertheless, the minister presented a new schedule for the production of the vaccine, which was approved by the court of appeals. This time, the court also designed a scheme to monitor the implementation of the judicial resolution: the national ombudsman was appointed to follow up and to inform about the measures taken by the government; the SIGEN (*Sindicatura General de la Nación*) was ordered to control the budget execution; and an Advisory Commission was appointed to assess the technical results of the measures taken by the government. Furthermore, the court of appeals began assuming a very strong role monitoring the implementation of the judicial resolution, holding hearings with the involved parties to follow up the process.

During 2001-2002, the economic and institutional crisis affecting Argentina also impacted on the development of the project. Funds were assigned but were not received on time by the Institute.[101] In spite of all that, in September 2002, the construction works

[99] The judge also resolved that the funds assigned in the 2001 national budget for the production of the vaccine were restricted (*indisponibles*), meaning that those funds could only be used to that end.
[100] Interview with Delia Enria (October 1, 2008). See also the comments made in the local media by the president of Fundación Maiztegui, Ildefonso Olego (Semanario Colon Doce, "Fiebre Hemorrágica Argentina", August 9, 2002).
[101] For instance, the President of Fundación Maiztegui stated in an interview for a local newspaper that the INEVH was receiving its assigned funds with a 3-4 months delay, and this was making the functioning of the research institute almost impossible (Semanario Colón Doce, "Fiebre Hemorrágica", August 9, 2002).

were over and the laboratory was ready. At that point, a new administration was in charge of the executive branch of government. The new president, Eduardo Duhalde and his minister of health, Ginés González Garcia, both attended the opening of the laboratory, and the government granted a special fund for the production of the vaccine. However, production could not begin yet. The Argentine version of Candid 1 had still not been authorized by the quality control agencies belonging to the minister of health. Only in 2003, the vaccine was authorized, and shortly after, the fist stock of 40.000 vaccines produced in Argentina was ready.[102]

The next stage in the process was the clinic trial and the final validation of the vaccine. Only then, the vaccine could be applied to the population. By that time, there was a new government in charge of the executive, Nestor Kichner from the Peronist party, who had won the presidential election in May 2003. In August 2005, INAVH finally received the authorization to proceed with the clinic trial. 946 volunteers, residents from rural communities of the area affected by AHF, received the vaccine. By the middle of 2006 the results were known and were positives, and in August of that year, the ANMAT approved and registered the vaccine Candid 1.[103]

During all this time, the court of appeals was closely following up this process. Between 2001 and 2006, the court held at least two public hearings a year to monitor the development of the project to produce the vaccine. In the last hearing, in September 2006, the court was formally informed that Candid1 has been approved and, in 2007, the vaccine began to be applied to the population in the AHF endemic area.[104] More than 15

[102] Website of Fundación Maiztegui (http://www.fundacionmaiztegui.org.ar/800x600/Marcos/Total.htm)
[103] In contrast to the lack of national media attention to the AHF policy issue, these advances in the local process to produce the vaccine did received coverage from the national print media (see La Nación, "Avance en el país contra el mal de los rastrojos ", June 24, 2006; Página 12, "Vacuna", September 15, 2006; Clarin, "La vacuna contra el mal de los rastrojos ya se puede elaborar en el país", September 29, 2006; La Nación, "Producirán en el país la vacuna contra el mal de los rastrojos", October 10, 2006).
[104] Página 12, "El campo ya tiene su vacuna", March 7, 2007.

years after taken the policy decision, the Argentine state was finally able to locally produce the vaccine against the "*mal de los rastrojos*".

Analysis of conditions triggering judicialization

Despite the long time it passed before achieving a successful ending, the social and political demand to produce the vaccine in Argentina can hardly be considered as a "loser" of the policy process. In the 1990s, the Menem government clearly undertook the policy commitment to locally produce the vaccine and assigned a budget to that end.[105] Moreover, no one of the subsequent national administrations openly reviewed that decision, nor denied the existence of those legal and policy commitments to address the FHA. In this context, the judicialization of the conflict about the production of the FHA vaccine clearly dealt with the implementation of policy goals and measures that were already taken through the policy making processes.

In relation to the social actors demanding the local production of the vaccine, they were able to access the policy process but did not have much political leverage to influence the policy debate. The core of the social demand for the vaccine was embodied by members of the scientific community, many of whom worked in scientific agencies and institutions belonging to the state. Their professional prestige and position within the state apparatus facilitated individual access to policy makers, but at the same time their

[105] In fact, that is the argument of the court of appeals. In its resolution, the court stressed that the government had already assumed a legal commitment to produce the vaccine (own translation from Spanish): *"…that clearly emerges from the proceedings that the national state…has taken the commitment to produce the vaccine against the Argentine Hemorrhagic Fever…the issue to decide, then, is whether the defendant has accurately fulfilled its duties or, on the contrary, it has committed omissions harmful to the right to health of the population potentially affected by the above mentioned illness…"* (item XII, sentence of the court of appeals on "Viceconte, Mariela Cecilia c/Estado Nacional -Ministerio de Salud y Acción Social- s/ amparo ley 16.968").

ability to openly advocate for this issue, and especially to openly criticize the government was rather limited.[106] Moreover, they did not have the institutional and organizational capability to reach and mobilize broader audiences around AHF issues beyond the local communities in the endemic area. The disease mainly affected rural populations, and it was not an issue that raised the attention of the national media and, hence, of the public opinion at large.[107] At the local level, farmer associations and other local groups did play an important role supporting scientific and medical activities around AHF issues, which led to the creation of Foundation Maiztegui.[108] The foundation carried out many advocacy actions such as holding meetings with members of congress, sending letters to policy makers, etc.[109] However, there was not a widespread and sustained social mobilization at the local level or other type of massive collective actions aiming to influence the policy about the AHF vaccine.[110] In sum, the affected rural population was not organized and mobilized around the demand for the production of the vaccine against FHA, the involved scientific community did not had the institutional resources to sustain advocacy efforts, and the matter was largely unknown for the broader public opinion.

In spite of the lack of political leverage of the social demand for the local production of the vaccine, the national Congress was relatively attentive to the issue.

---

[106] Interview with Victor Abramovich (August 12, 2008) and Delia Enria (October 1, 2008).

[107] An exception to the lack of media attention was the outbreak of Hantavirus in 1996. This issue also raised media and public attention to the risks posed by AHF. See above, footnote 94.

[108] Federación Agraria Argentina, Federación Argentina de Cooperativas Agrarias, Asociación de Cooperativas Argentinas, Cámara de Comercio de Pergamino were some of the associations involved in the creation of Foundation Maiztegui (see website of Fundación Dr. Julio Maiztegui para el Desarrollo Científico y Tecnológico Regional).

[109] Phone interview with Delia Enria (October 1, 2008).

[110] A fact that might help explaining the lack of massive collective action is that since 1991, when the vaccination campaigns began, the number of people affected by the disease decreased significantly from a historical average of 700 cases a year to only 150-200. Nevertheless, when fatal cases were known, it triggered social demands for the vaccine among the local communities (see, for instance, Página 12 "El mal de los rastrojos ya crea terror por la falta de vacunas", July 4, 2002). However, these protests were rather episodic and did not constitute a sustained effort of massive social mobilization.

Between 1991 and 1999, there were over 10 resolutions and declarations approved by the House of Representatives and/or the Senate requiring the executive branch of government to provide funds for the construction of the laboratory, requesting information about the delays, etc. Congress was particularly active during the years 1991 and 1992, when the government at the time was taking the decision of producing the vaccine in Argentina.[111] Moreover, the support for the local production of the vaccine crossed party lines. The resolutions were generally approved with broad political support, and most of them were co-sponsored by legislators from the party of government and parties of the opposition. However, despite of the political consensus around the policy of locally producing the vaccine, the issue did not occupy a place of relevance in the legislative agenda. A good example of this was the trajectory of a bill approved by the House of Representative on November 1997, declaring of national interest the production of the vaccine and assigning funds to that end. The bill was co-sponsored by legislators from the Peronist party and opposition parties, and was passed by the House with broad political support.[112] However, it lapsed in the Senate's commissions two years later without even being treated. The fate of this bill is an indicator that although congress was relatively attentive and supportive, the issue was clearly not a legislative priority.

[111] On July 3, 1991, the House of Representative passed a declaration requiring the national executive to complete the construction of the laboratory needed to produce the vaccine. This declaration was co-sponsored by legislators from the Peronist party and several opposition parties (see the online database of the Cámara de Diputados de la Nación Argentina, files 4957-D-90 and 5989-D-90). On August 15, 1991, the House approved a new declaration requesting the executive to provide funds to build the laboratory. The declaration was co-sponsored by legislators from the Peronist party and the UCR (file 2255-D-91) Similarly, on May 23, 1991, the Senate approved a resolution requiring the executive to provide funds to produce the vaccine Candid 1. That declaration was sponsored by the Peronist legislators from the province of Santa Fe, one of the provinces most affected by the disease (see the online database of the Honorable Senado de la Nación Argentina, file 1341-S-90). During that same year, the Senate also approved two other resolutions requesting the government to inform about the measures taken in relation to AHF (see files 1133-S-90 and 1208-S-90, and file 0119-S-91).

[112] There were two bills proposed in the House. One was authored by Estevez Boero, a socialist legislator from the province of Santa Fe, and co-sponsored by several deputies of the opposition parties. The second bill was co-sponsored by a group of legislators of the Peronist party. Both bills were aggregated and treated jointly (see the online database of the Cámara de Diputados de la Nación Argentina, files 3942-D-96 and 4482-D-96).

In relation to the role of the executive, the successive national governments involved in this dispute, were somehow supportive or at least were not openly opposed to the policy of producing the vaccine in Argentina. It is worth remembering that it took more than 15 years to produce the vaccine since Menem's government decision to assign a specific budget to that end. During that time, four different national administrations passed.[113] All of them took some measures or steps –although insufficient and/or inadequate- towards the goal of locally producing the vaccine against FHA. Moreover, all of them assigned funds from the national budget to continue the project. Only during the period of Minister of Health Hector Lombardi (1999-2001), the national government openly raised doubts about the convenience of producing the vaccine Candid. But even in this case, the government did not modify the existing policy on the matter.

In contrast, problems and deficiencies at the level of the state apparatus strongly affected the implementation of the policy towards the AHF vaccine. The construction of the high security lab and validation and production of the vaccine were very complex technical and operational tasks, and as the evidence indicates, the state apparatus and procedures were not always well suited to deal with this type of project.[114] For instance, in relation to budgetary issues, funds were often formally assigned but were not transferred to the INEVH on time, or the funds were assigned to be spent on certain specific items but not on others that were needed for that particular stage of the

[113] Of course, this number does not take into account the institutional crisis of 2001, with four presidents in two weeks.

[114] Interviews with Victor Abramovich (August 12, 2008) and Delia Enria (October 1, 2008). It is interesting to note the similarities between some of the comments and critiques about how state procedures affected the production of the vaccine to those formulated in the case of the state provision of medication for HIV/AIDs. For instance, there was a shared critical assessment of the state's procedures to purchase goods and supplies and how many times they negatively impact on the implementation of policies dealing with public health issues.

production process, etc.[115] This type of situations caused delays and affected the development of the project. For instance, in a report submitted by INEVH to the court explaining the delays in the production of the vaccines (September 2000), the institute informed that the construction works for the laboratory were finished and that the next stage in the production of the vaccine required the appointment of new personnel and the acquisition of certain supplies.[116] The INEVH's report stated that the institute had already required this to the minister of health, but it had not received anything yet (report cited by Centro de Estudios Legales y Sociales 2001, 202). However, at the same time, the minister of economy informed to the court that the budgets assigned for the production of the vaccine during the previous years had been invariably sub-executed (Centro de Estudios Legales y Sociales 2001, 202). In short, while the executing agency was claiming that did not receive the resources to carry out the tasks needed for that stage of the project, the minister of economy was saying that the funds assigned for the production of the vaccine had not been entirely used. Arguably, this suggests that the delays were not due to lack of funds, but rather to operational problems in the functioning of the state apparatus.[117]

Similarly, bureaucratic politics and weak communication and coordination among the different state agencies greatly affect the implementation of the policy. For instance, when in 2001 the court of appeals held a meeting with the different state agencies to identify the obstacles hindering the advance of production of the vaccine, there were strong disagreements among them about the steps needed to finish the process of production. The National Administration of Health Laboratories and Institutes –ANLIS

[115] Interview with Delia Enria (October 1, 2008).
[116] The ANLIS (*Administración Nacional de Laboratorios e Institutos de Salud*), also submitted a report making the same point. The ANLIS' report stated that new personnel (15 positions, specifically) and supplies were needed to advance to the next stage in the production of the vaccine (report cited by Centro de Estudios Legales y Sociales 2001, 202).
[117] In relation to this point see also Millón Quintana (unpublished manuscript).

(*Administración Nacional de Laboratorios e Institutos de Salud*), informed that the local production of the Candid 1 required the previous habilitation of the laboratory and of the clinical trials by the National Administration of Medicines, Food and Medical Technology –ANMAT- *(Administración Nacional de Medicamentos, Alimentos y Tecnología Médica)* and the INEVH, the national institute which was working on the local production of the vaccine since the beginning of the 1990s, had not requested those authorizations yet (Cerro 2007).[118] Moreover, even after the laboratory was finished and authorized (September 2002), it still took approximately 3 more years for INEVH to obtain the authorization for the clinical trials (September 2005). These delays in this process of authorization and validation of the vaccine are a good example of how problems of communication and coordination among the different state departments and agencies, including situations of bureaucratic politics, affected the development of the vaccine.

Summing up, the policy decision to locally produce the vaccine against the Argentine Hemorrhagic Fever took almost 15 years to be achieved. The heavy involvement of the judiciary in the implementation of this policy occurred in a context in which the original political decision to locally produce the vaccines was not revised or rejected for any of the successive national governments nor for congress, however, problems and deficiencies at the level of management and operation of the state apparatus greatly affect the implementation of this policy and the social demand for the vaccine was weak and did not have sufficient political leverage to push the issue forward in the policy agenda.

[118] It is worth noting that all the state agencies mentioned (ANLIS, ANMAT, INEVH), were part of the same national minister, the minister of health.

CONCLUSIONS

These cases studies reaffirm the "state deficiencies" scenario to policy judicialization resulting from the QCA analysis. In the three cases, the policy processes were heavily judicialized. The judiciary was one of the main institutional arenas, if not the main, where these policy discussions and processes unfolded. Moreover, the judicialization of the policies in question occurred under the same, basic, causal configuration. In all the cases, the social demand and groups behind the claims, either for addressing the social needs of the indigenous communities in Chaco, providing health treatment and medicines to people living with HIV-AIDS or producing the vaccine against AHF, could hardly be considered losers of the policy processes. In each of the cases, there was already legislation or administrative regulations establishing clear policy commitments and legal mandates. The judicialization of these policies, then, clearly referred to and dealt with the implementation of policy goals and measures that were already taken through the policy making processes and were already part of the legal framework.

This lack of proper policy implementation, however, was not due to the opposition of the political administrations in charge of the executive. In fact, in many instances, the executive supported the policies in questions. In contrast, in all of the three cases, there were structural problems at the level of the state apparatus that strongly affected the implementation of these policies mandates and goals. Each of the case studies is full of details and evidence about how different types of problems in the organization and functioning of the state negatively affect policy implementation.

Some may argue, however, that these policies were not properly and timely implemented by the state apparatus because at the end they were not priorities for the political elites in charge of the government. I acknowledge that this argument might have

some potential validity. If these issues had been a first priority for the administrations in charge of the executives, and they would have put all their efforts and attention in overcoming the obstacles hindering these policies, one could reasonable expect that implementation could had been better and faster (and maybe, these disputes would had not become judicialized). However, this hypothetical does not invalidate our general argument about the relevance of state capacity issues for explaining weak implementation and ultimately, the judicialization of certain type of public policies. There is a significant conceptual and empirical difference between a situation in which an executive government is resistant, or even reluctant, to implement a policy approved through the democratic decision-making process, and therefore it forestalls the state bureaucracy to comply with that legislation; and a situation in which a government takes the minimum and necessary steps to implement a policy measure, but they are not sufficient to overcome state capacity problems weakening its implementation. These two situations speak of two different types of political scenarios under which judicialization of policy issues is likely to occur. The former is clearly built around the lack of political will of the politicians in charge of government to comply with the rule of law, while the latter is mainly built around the weaknesses of the state to properly and timely implement or enforce a policy. In the three cases discussed in this chapter, the involved administrations took a very basic but fundamental step needed to implement a policy: budget funds were assigned to carry out the policy measures in question. At least, this indicates that the involved governments were not openly opposed to these policies and were not reluctant to comply. However, in all three cases, policy implementation was greatly limited and affected by different structural problems in the operation and organization of the state apparatus.

Furthermore, the deficient capability of the state to intervene in these policy issues was clearly autonomous from changes in the political administrations in charge of the executive. In fact, there were several different governments involved in each of the three policy issues, and nevertheless and despite of the political changes, judicialization continued in all of the cases. This is very clear in the case of the health and food emergency in Chaco. The involvement of the courts begun during the administration of governor Nikish (UCR), who took measures to address the emergency that were largely considered insufficient by the actors involved. The new administration of governor Capitanich (PJ) was much more accessible to the indigenous groups and took much more aggressive measures to address the emergency, however, the situation in the communities did not change significantly, and the judicialization of the policy continued. Similarly, in the case of the AHF vaccine, four different national administrations passed until the vaccine was finally produced. No one of the subsequent government reviewed Menem's policy of assigning a budget to produce the vaccine. In fact, all of them took some measures or steps –although insufficient and/or inadequate- towards the goal of locally producing the vaccine against AHF. In short, the lack of fulfillment of the policy commitments and mandates in these three cases was rather related to structural problems at the level of the state than to the opposition of those in charge of the executive government.

Similarly, in all three cases, the legislative assemblies were relatively attentive to the policy issue and involved in the policy process. In the HIV-AIDS case, the legislature was a main actor in building the policy framework. In the cases of the health and food emergency in Chaco and the AHF vaccine, the legislatures played more of an oversight role of the government's policies on these matters. Moreover, there was a general and broad political consensus around these issues. This is very clear in the case of the AHF

vaccine, where most of the legislative resolution were co-sponsored by legislators of the governing and opposition parties, and also in the case of medical treatment for HIV/AIDS. This political consensus across parties in the legislature was less strong in the case of the health and food emergency in Chaco. This might be related to the temporal proximity between the emergency and the provincial election, and the electoral need of the parties to differentiate one from each other.[119] Despite of this, the Chaco provincial legislature, as well as the legislatures in the other two cases, were not absent in the policy process.

In relation to the political leverage of the social demand and actors behind each of these policy issues, there were clear differences among the cases. In the HIV/AIDS case, the social actors had access and were part of policy making processes and debate. In the Chaco case, the affected indigenous communities were in abject poverty and had very limited capability to mobilize and press demands on the state, however the IDACH and other allies triggered and sustained the social concerns about the situation affecting these communities, and media coverage definitely helped placing the issue in the public agenda. In the case of the AHF vaccine, in contrast, the matter was largely unknown for the broader public opinion. Furthermore, the involved scientific community had limited capability to be part of the policy process and the affected rural population was not strongly organized and mobilized around the issue. In short, there were clear differences in the political access and leverage of social actors involved in each policy issue. However, the fact that the judicialization (the outcome) occurred in all three cases it is a clear indicator that this was not a relevant factor, at least in this causal configuration.

Summing up, the long and heavy involvement of the courts in the three policies examined in this chapter was due to serious and structural state deficiencies in the

[119] This was a point stressed by several of the speakers during the debates in the Chaco's legislature about whether declaring the indigenous communities in social emergency or not (see above, footnote 63).

implementation of existing policy mandates. Interestingly, this occurred in contexts where the executives were not openly opposed to these policies, and the legislatures were relatively attentive and involved in the policy issue. This scenario, then, stresses that problems of implementation or enforcement at the level of the state, not the lack of responsiveness of the political system, constitute a main condition for the judicialization of certain policy issues.

CHAPTER 5: WEAK HORIZONTAL ACCOUNTABILITY AS A SOURCE OF JUDICIALIZATION

This chapter analyzes in detail three cases of judicialization of public policy in Argentina: the land tenure program for indigenous communities in the province of Jujuy, CEAMSE's waste disposal policy in the Punta Lara landfill, and the re-negotiation of the public utility concessions during the Duhalde government. It also includes a brief analysis of the conflict about indigenous land tenure rights in the province of Salta. According to the QCA analysis developed in chapter II, these cases shared a common pattern: the judicialization of these policy issues occurred in contexts in which the governments did not implement or enforce existing policies, and the legislatures were rather passive. This configuration reflects one of our theoretical arguments developed in chapter 1, about the type of political scenario under which judicialization of public policy is likely to occur in Argentina. This argument has two main elements that the reader should pay special attention when reading the case studies covered by this chapter. First, in this type of disputes, social groups judicialized a policy issue not because the majoritarian policy making venues have rejected or denied their policy demands, but because the state does not uphold relatively clear existing policy mandates. Second, this lack of implementation or compliance with the rule of law occurs in a political context characterized by the combination of a discretionary exercise of power by the executive and a legislature that allows the executive to interpret and apply the existing rules as it pleases.

As in the previous empirical chapter, the development of these case studies allows for assessing the internal validity of the QCA coding for these policy disputes and of the causal configuration identified through the QCA analysis. Each case study is organized in

two parts. The first one is a historical, detailed description of how that particular policy issue evolved and became judicialized. The second part focuses on certain aspects or features of the case that directly speaks to the five conditions that are theoretically relevant for this study. The chapter concludes with an analysis of the similarities and differences among the cases examined and an overall assessment of the validity of this causal configuration as an explanation of why public policy becomes judicialized.

Following, I include the fuzzy set coding of the causal conditions for the four cases analyzed in this chapter.

Table 5.1: Fuzzy Membership Scores of Causal Conditions

Cases	*Policy Loser*	*Weak Political Leverage*	*Legislature Passiveness*	*Opposition of Executive*	*Deficient State Capacity*
PRATPAJ Indigenous Land Jujuy	**0** (1)	**.33**	**.67**	**1**	**.33**
CEAMSE Ensenada	**.33**	**.33**	**.67**	**.67**	**.33**
Public services tariff increases	**.33**	**.33**	**.67**	**.67**	**.33**
Lhaka Honhat. Indigenous land, Salta	**.33**	**.67**	**.67**	**1**	**0**

(1) As explained above, in fuzzy set language, 1 means a case has full membership in a set, .67 means that a case is more in than out of a set, .33 means a case is more out than in a set, and 0 means a case is clearly excluded from the set. When these scores are translated into Boolean logic, scores 1 and .67 indicate that a causal condition is relevant or present in a given case. On the contrary, scores .33 and 0 indicates that a causal condition is irrelevant or absent.

INDIGENOUS LAND TENURE RIGHTS IN JUJUY

In December 1996, the national government and the provincial government of Jujuy signed a covenant establishing a program to regularize the land tenure status of indigenous communities in the Puna region, called *"Plan de Regularización y*

Adjudicación de Tierras para la Población Aborigen de Jujuy" (PRATPAJ).[120] Basically, the national government committed to provide the funds to cover land measurements and other costs, and the provincial government pledged to implement the program.[121] The program benefitted around 22.000 families of indigenous communities already settled in public lands ("*tierras fiscales*") that belonged to the province of Jujuy.[122] The covenant also established that the land titles would be granted in the way requested by the communities.

A year later, in November 1997, the provincial legislature passed law 5030 ratifying the covenant signed by the executive. Both, the provincial executive (at that time under the administration of Carlos Ferraro, 1996-1998) and the local legislature, were controlled by the Peronist party of Jujuy. Law 5030, however, established very demanding requirements to grant collective land titles, while making easy the granting of property rights at the individual level. Article 3 of the law stated that the granting of any collective land title had to be approved by law of the legislature.[123] This provision aimed to make the operation of the program more difficult and complex, which generated

---

[120] The PRATPAJ was part of a broader initiative of the national government (at the time, under the administration of President Menem) to promote the access of indigenous peoples to their ancestral lands. Besides Jujuy, similar plans were developed in the provinces of Chubut and Rio Negro. The initiative was presented as an effort to put into practice the constitutional reform of 1994, which recognizes that indigenous communities can have communal possession and ownership of the lands they have traditionally occupied (article 75, subsection 17).

[121] The covenant established that the funds would be transferred to the provincial government in 8 installments. According to the text of the agreement, the first installment was immediately transferred upon signature of the covenant, and the provincial government had a term of three months to use the funds. The rests of the installments were to be transferred according to the advances of the program and as the provincial government renders account of how the funds were being used (clause 1 of the covenant).

[122] The story of how that land became property of the province of Jujuy is relevant to understand the PRATPAJ. These lands were originally expropriated by the national government during the presidency of Juan Peron in 1949 to be granted to the original communities living in the area (decree 1884/49). In 1958, the national congress passed law 14.551/58, which transferred the expropriated land to the province of Jujuy with the purpose of granting it to the population settled there.

[123] The granting of individual property rights, on the other hand, was comparatively much simpler. It just had to go through an administrative procedure established by law 4394/88 on public lands and settlements (*"ley de tierras fiscales y colonización"*).

problems with the national government (ENDEPA and MEDH, 2003, section IV). Moreover, the provincial government did not render account for the first transference of funds, so the national government did not make the second transference of funds established by the covenant. As a result the program stalled.

The indigenous communities and other organizations and groups working on indigenous issues began to mobilize around this matter. In May 2000, with strong support from the Catholic church, they created the Forum of Indigenous Communities of Jujuy (*Foro de Comunidades Aborígenes de Jujuy*), which has as one of its main purposes to reactivate the land tenure program (ENDEPA and MEDH, 2003, section IV). By December 2000, the provincial government (at this time already under the administration of Eduardo Fellner, 1998-2007) signed an additional protocol to the original covenant with the national government.[124] The Forum as well as other indigenous organizations took part in the negotiations for the new agreement and strongly advocated for the participation of the indigenous communities in the implementation of the program. As result, the protocol created the Commission for Indigenous Participation ("*Comisión de Participación Indígena"*), known as CPI for its acronym in Spanish. The CPI was formed by an elected representative from each indigenous community, the Catholic bishop of Jujuy and the Catholic bishop of Humahuaca. Furthermore, the execution of the program was now under the responsibility of a commission (known as the UEP), formed by a representative of the provincial government, of the national agency for indigenous issues (*Instituto Nacional de Asuntos Indígenas* -INAI), a legislator of the party of government in the provincial legislature, and a legislator from the opposition.

A few days later, the provincial legislature –controlled by the party of the government, the Peronist party- approved law 5231/00, ratifying the new agreement

[124] *"Protocolo Adicional al Convenio de Regularización y Adjudicación de Tierras, en Beneficio de la Población Aborigen de la Provincia de Jujuy"* (December 11, 2000).

between the provincial government and the national government. Article 2 of the new law expressly established that land rights should be granted to the communities, and therefore repealed the corresponding provisions of the previous law 5030/97.[125] Between March and April 2001, the indigenous communities elected their representatives at the CPI. The provincial government, in its turn, approved the conformation of the CPI and of the UEP (decree 3810-BS). Furthermore, the national government began transferring the funds for the program again. In short, the structure and resources to re-enact the implementation of the land tenure program were ready.

However, the program did not advance as planned. Instead, the provincial government, thought its land settlement agency (*Instituto de Colonización)*, continued to grant land titles to individual settlers, either members of indigenous communities or *"criollos"*. Furthermore, the government set aside land included in the PRATPAJ to be used for other purposes such as natural protected areas, infrastructure, etc. Indigenous groups denounced the lack of progress in the implementation of the land tenure program and that the government was systematically taking measures weakening the program's goals. The following paragraph, belonging to a public statement made by Jujuy's indigenous organizations and addressed to the national minister of social affairs Alicia Kirchner in September 2003, is quite indicative of how the indigenous groups and their allies viewed the implementation of the program (own translation from Spanish):

> *...seven years have passed since the covenant signed by the province and still we do not have the titles of our lands. In most cases, not even the land measurement works have been done. The provincial government has tried many different explanations to justify the delays, and very often its state agencies –such as the 'instituto de colonización'- walked behind our backs, undoing the work we have*

[125] *"La regularización de los títulos de las tierras tradicionalmente ocupadas por las comunidades indígenas que se realicen con los fondos establecidos en el Convenio serán para el otorgamiento de títulos de propiedad comunitaria..."* (article 2, law 5231/00).

done, spreading confusion among the communities or slowing down land titling processes with illegal and absurd requirements…[126]

By the middle of 2003, a group of 86 indigenous leaders, including the indigenous representatives and the Catholic church representatives of the CPI, filed a *"recurso de amparo"* against the province of Jujuy at a provincial administrative court. Basically, the plaintiffs asked the court to order the provincial state, in particular the *Instituto de Colonización*, to stop granting individual property rights over land assigned to the indigenous communities through the PRATPAJ, and to establish a year dateline for the government to grant the collective land tenure rights to the communities. In its response, the government basically argued that, in some cases, indigenous people have asked for individual property rights over the land where they were settled, and that granting those rights was legal. Furthermore, it argued that the delays in the implementation of the program were related to the lack of timely transfer of funds from the national government.

The legal process moved very slowly as did the execution of the indigenous land program. By 2006, almost a decade after establishing the PRATPAJ, the provincial government –still under the administration of governor Fellner- had granted only 3 communal tenure rights and 4 other were under process; more than 100 communities

---

[126] Cited by Argentina indymedia (http://argentina.indymedia.org/news/2003/10/139776.php, October 9, 2003). There are other several public statements issued by the indigenous communities and organizations of Jujuy about this issue. I mention just few of them: On April 18, 2002, it was issued the *Petitorio del Foro de Comunidades Aborígenes de Jujuy*, which stated that almost over a year after the reenactment of the program, the PRATPAJ had only marked the boundaries of the territory of one community. On October 8 2002, the Forum and other indigenous organizations issued a public statement called *"Mensura y Entrega de Títulos comunitarios !YA!"*, (document included in the Report prepared by Endepa and MEDH, 2003, section IV). On March 26, 2004, the CPI issued a media statement in which the members of the commission detailed the provincial government's failures to implement the PRATAJ. It is worth transcribing the first sentences of the statement: *"The land program began in 1996, up to this date, almost 500 hundred thousand pesos has been already spent, and not even one communal land titled has been granted yet…"* (Parte de prensa de la CPI del programa de tierras de Jujuy, March 26, 2004).

were still waiting for their land tenure rights.[127] In May 2006, the court finally issued its resolution ("Andrada de Quispe y otros c/ Estado Provincial. Acción de Amparo. Expte. Nro. 8-105.437/03").[128] It ordered the government to stop granting individual property rights over land assigned to the indigenous communities. Moreover, it set a term of 15 months for the government to complete measurement and other works needed to grant collective rights to the indigenous communities. The government strongly criticized the court's resolution; it argued that it was not possible to grant the land titles in 15 months and announced that it would appeal it.

The government's decision to appeal was read by the indigenous communities as an open rejection of the land program, and it triggered strong indigenous protests. In August 2006, the protests reached its peak when several hundred indigenous people blocked interstate route 9 for several days.[129] After negotiations, the provincial government signed an agreement with indigenous leaders by which, among other issues, it made the commitment to deliver at least 29 land tenure titles by the end of the 2006.[130]

During the rest of 2006, the level of implementation of the PRATPAJ increased significantly. On December 29, 2006, in a formal event in the *"Casa de Gobierno"* attended by the indigenous representatives of the CPI, the provincial government signed 26 decrees granting titles to different indigenous communities settled in the province of Jujuy.[131]

---

[127] Data cited in the local newspaper El Pregón ("Para la Entrega de Tierras", May 15, 2006). Government officials claimed a relatively different number of granted titles: 7 (see, for instance, statement of the Secretary of Human Rights of the government of Jujuy, Elizabeth Eisemberg in El Pregón; "Dialogar sin presiones" May 10, 2006). In any case, it was a relatively small number of titles granted compared to the number of communities waiting for theirs.

[128] It was a divided resolution. Judge Villafane and judge Morales voted in favor of the plaintiffs, and judge Gonzáles voted in favor of the provincial government.

[129] See Pagina 12 ("Un doble corte de rutas en Jujuy por el reclamo indígena de tierras", August 9, 2006).

[130] For the complete text of the agreement see the local newspaper El Pregón ("Fellner afianza su política a favor de las comunidades originarias, August 11, 2006).

[131] See the local newspaper El Pregón ("Comunidades indígenas: Reciben títulos de tierras", December 29, 2006).

Analysis of conditions triggering judicialization

The demand for land tenure rights for the indigenous communities in Jujuy can hardly be considered a "loser" of the policy process. The main assumption of the loser argument is that when social actors cannot achieve their policy goals through the traditional political venues, they turn to the judiciary. But in this case, there was a covenant and a protocol signed by the national and provincial governments establishing the program to grant land tenure rights to the indigenous communities, and the program was ratified by the provincial legislature. It is true that when the local legislature ratified the covenant (law 5030/97) it also established very strict provisions regarding the granting of communal rights. Arguably, this law expressed a policy view that differed significantly from the one embedded in the agreement creating the land program. However, three years later, the provincial legislature passed a new law (5231/00) that ratified the PRATAJ again, and modified the previous law (5030/97) that restricted the granting of communal land tenure rights. In this context, the judicialization of the demands of the indigenous groups clearly dealt with the implementation of policy goals and measures that they had achieved through the conventional policy making process, but were not being properly enforced.

The social actors demanding land tenure rights for the indigenous communities in Jujuy were not politically disadvantaged either. Their level of organized collective action of the local indigenous groups was relatively strong, and they were able to access and to be part of the policy making processes and debate around the land tenure rights. As mentioned above, during the year 2000, the indigenous groups with the support of the Catholic church, organized the *"Foro de Comunidades Aborígenes de la Provincia de*

Jujuy" to coordinate their efforts on the issue of indigenous land rights and the reactivation of the land tenure program. Given the obstacles faced by the program after the covenant was signed, the indigenous groups actively participated in the negotiations for the additional protocol, which reinforced the mandate that the land tenure titles should be granted to the communities, and they strongly lobbied the provincial legislature to ratify the new agreement (law 5231). Furthermore, they actively participated in the *"Comisión de Participación Indígena"* –CPI– created by the protocol to advise and monitor the implementation of the program. Beyond the discussion about how relevant or efficacious the mechanism of the CPI might have been, the participation in the institutional structure of the program helped indigenous groups to access information and other actors involved in this policy, including national government officials. For instance, when in 2004, the national government did not make on time the third installment of the program's funds to the provincial government, the members of the CPI contacted the national authorities and got part of the funds transferred, so the program's technical team could keep working.[132] This is just an example of the type of access and contact that the indigenous groups and its allies gained through the CPI. In sum, they were able to access and be part of the policy process.

Despite the agreements signed with the national government, the provincial executive did not support the policy of granting collective land tenure rights to the communities. Two main reasons justify this assessment. First, the provincial government did not advance on the implementation of the program even though it had the resources to do so. As mentioned above, by mid 2006, when the court issued its resolution and almost a decade after the creation of the program, the province had granted only between 3 to 7

[132]Media statement from the CPI (available in http://argentina.indymedia.org/news/2004/03/185730.php).

(depending on the sources) collective land tenure titles to indigenous communities.[133] It is worth noting that during all that period, the province was run by the same political party, the Peronist party (in fact, since the return to democracy in 1983, Jujuy has always been governed by the Peronist party); moreover, for most of that period, the provincial government was led by the same governor, Eduardo Fellner (1998-2007).[134] Second, the government developed a policy of grating property rights to individuals over lands that were encompassed by the PRATPAJ and which were supposed to be granted to the indigenous communities. In other words, the provincial government was not just reluctant to fully implement the land program, it also took measures and actions that weakened the program's policy goals.

Many different reasons can be articulated for explaining why the provincial government did not support the implementation of this policy. In principle, communal rights cannot be the object of market transactions (they cannot be sold, transmitted or subject to liens or attachments) which was perceived as an obstacle to modernizing the local economy and to promoting economic development. More specifically, many potential mining projects in Jujuy overlapped with indigenous land rights claims, which seriously threatened the prospect of those mining investments in the province, given the specific indigenous and environmental protection regulations that would apply to those lands.[135] Others have even suggested that the notion of indigenous territories could lead

---

[133] In relation to the different numbers of land title granted and the different sources, see above, footnote 127.

[134] In December 1996, the initial agreement with the federal government establishing the program was signed by governor Carlos Ferraro. When in December 1998, Ferraro resigned due to social turmoil and corruption scandals, the local legislature elected Eduardo Fellner as governor to complete the period December 1998- December 1999. Fellner, then, won the governor's elections for the periods 1999-2003 and 2003-2007. In 2007, Fellner's vice-governor, Walter Barrionuevo, won the gubernatorial election and became governor for the period 2007- 2011.

[135] In fact, for many observers, mining investment is one of the main obstacles (if not the main) to the granting of land tenure titles to the indigenous communities (phone interview with Agustina Roca, November 4, 2009).

to potential future challengers to the authority of the state. In short, and beyond all these plausible reasons, the issue of communal property rights clearly raised a lot of resistance among the political establishment in Jujuy (as well as in other Argentine provinces with significant indigenous population).[136] One can pose the question, then, why did the provincial government take the legal and policy commitment to implement this program in the first place? pressures from the national government? access to national and international funds? reputational fears to be perceived as backward? Whatever the reasons, the evidence detailed above clearly indicate that the provincial government did not have the political will to fully implement the indigenous land tenure program.

In contrast, state capacity issues did not significantly affect the implementation of the PRATPAJ. The national government provided funds to cover the program's costs, and the technical and human capabilities required to carry out land measurement works and titling processes where easily within the reach of the Jujuy state apparatus (in fact, the province already had a land agency). Furthermore, by the middle of 2006, after almost a decade of the creation of the program, the province had granted few collective land tenure titles to indigenous communities; however, by the end of 2006, after the court issued its resolution and governor Fellner signed the agreement with the indigenous representatives ending the route blockages, the provincial government granted 26 collective land tenure titles in less than eight months. This sudden increase in such short term clearly suggests that the weak implementation of the PRATPAJ during almost a decade was mainly due to the government's policy preferences, and not because of deficiencies in the state apparatus or lack of state capability to implement the program.

[136] A similar resistance to the notion of communal territory and communal property rights can be observed in the case of Lhaka Honhat in Salta, also –briefly- analyzed at the end of this chapter.

In relation to the provincial legislature, the local assembly was clearly aligned with the executive and did not assume its monitor role regarding the implementation of the land policy. As mentioned above, the Peronist party of Jujuy has always controlled the executive government and the provincial legislature since the return to democracy in 1983. This is a political and institutional system, then, characterized by the dominant role of the local Peronist party, which arguably helps explain the legislature's alignment with the executive on the indigenous land issue and the weak legislative oversight over the government's actions.

As mentioned above, the legislature ratified the two agreements signed by the provincial government with the national government establishing the indigenous land program. In November 1997, the legislature passed law 5030 ratifying the covenant which created the PRATPAJ, and in December 2000, the local assembly passed law 5231 which ratified the additional protocol to the covenant. However, when the legislature passed law 5030/97, it included a provision making more difficult the granting of communal land tenure rights (article 3). Evidently, this contradicted the policy goals of the covenant promoted by the federal government and signed by the provincial government (at that time under the administration of Carlos Ferraro). One may argue that this might be an indicator of an autonomous legislature which was actually modifying an executive's policy decision. But that was not really the case. Three years later, the Peronist legislative block (indeed, many of the same individual legislators) voted in favor of law 5231/00, which explicitly derogated article 3 of the law 5030/97. I do not have a clear explanation of why the provincial legislature included such provision (article 3) in the law in the first place. I can only hypothesize that, given the resistance and disfavor that the issue of communal land rights raised across the political establishment in Jujuy, the provincial legislature in 1997 might have being just more open about its policy

preferences on this matter than the provincial executive who signed the covenants but did not implemented the program, and even boycotted it. Whatever the reason, it is clear that there were not significant policy differences between the Peronist controlled legislature and the provincial executive on this issue.

The alignment of the provincial legislature with the executive became even clearer in the implementation stage of the land program. Once law 5231/00 ratified the additional protocol and the PRATPAJ was formally re-enacted, the legislature did not fully exercise its power to monitor the unfolding of the program or to oversee the executive, which was taking measures that were weakening the policy goals of the PRATPAJ. This lack of legislative control is especially relevant in this case because the provincial assembly had a certain level of direct responsibility over the execution and implementation of the program. In fact, the legislature was part of the PRATAJ institutional structure: two legislators, one from the opposition and one from the party of the government, were part of the UEP (*Unidad Ejecutora del Programa*), the commission in charge of the execution of the program. In different public statements, however, the indigenous communities and their allies openly criticized the representatives of the provincial legislature in the UEP, for their lack of support to the indigenous land program.[137] The following quote from the minute of the II meeting of indigenous communities of Jujuy (April 18, 2002), is quite indicative of the opinion of the indigenous groups about the role of the legislature representatives at the UEP (own translation from Spanish):

> *...Due to the delays and lack of execution [of the program], the representatives of the communities asked for the immediate removal of the provincial legislators Humberto López [UCR] and Hugo Mamani [Peronist party] from the UEP.....because of their lack of engagement with the program and the communities, they requested to the president of the provincial legislature and to*

[137] See, for instance, CPI media statement (CPI Programa de Tierras de Jujuy, March 26, 2004).

the presidents of the two legislative blocks to change these legislators for others who know about the indigenous cause…

Summing up, the resistance of the provincial government to implement the indigenous land tenure program was complemented by a passive and aligned legislature which did not monitor the executive actions. This configuration of political conditions lead to the judicialization of this policy even in a context in which the social actors had political leverage and the state apparatus was capable of implementing the policy mandates.

CEAMSE'S WASTE DISPOSAL POLICY IN ENSENADA

During the year 2003, CEAMSE, the state-owned company responsible for the treatment and disposal of residential and industrial solid waste in the metropolitan area of Buenos Aires (AMBA), began gradually closing the highly controversial landfill of Villa Dominico in the Avellaneda-Quilmes counties, and redirecting part of that waste to the smaller Punta Lara landfill located in the municipality of Ensenada.[138] The company presented this increase in the waste disposed in Punta Lara as a transitory measure while they were looking for other permanent sites to dispose of the waste. CEAMSE's decision, however, raised strong social opposition in Ensenada and triggered a long policy dispute that ultimately had consequences for the solid waste disposal policy for the entire Buenos Aires metropolitan area.

In order to understand the dispute around the Punta Lara landfill, it is necessary to provide some basic information about CEAMSE and the institutional scheme regarding solid waste management in the AMBA. The state company *Coordinación Ecológica Área*

[138] Throughout this case, I use the term municipality and county as synonymous.

Metropolitana Sociedad del Estado (CEAMSE is the acronym in Spanish) was created in 1977 during the military regime, by an agreement between the military appointed authorities of the province of Buenos Aires and the city of Buenos Aires. Since its inception, CEAMSE's main purpose was to centralize the treatment and disposition of waste across the AMBA through sanitary landfills.[139] Accordingly, the city of Buenos Aires and 34 municipalities of the province of Buenos Aires that form the broadly defined metropolitan area, deliver their solid waste to CEAMSE.[140] The company, in turn, charges each local government a tipping fee per ton of waste delivered to the landfills. A central feature of this legal scheme is that the governments of the province of Buenos Aires and city of Buenos Aires are the co-owners of CEAMSE. In fact, they appoint the members of the board who run the state company.[141] Meanwhile, the municipalities of the metropolitan area are not partners but captive clients of CEAMSE. By provincial law 9111/78, these municipalities are banned from treating and disposing the waste originating in their jurisdictions. Instead, they are required to deliver it to CEAMSE, and pay for that service. Furthermore, they have no formal participation in CEAMSE's decision making process and management. As one can expect, this scheme generates a lot of tension between the local governments and CEAMSE, which manages

---

[139] Before the creation of CEAMSE, solid waste in the AMBA used to be burnt in open air dumps. Some of these dumps were managed by the local governments while others were just open sites where waste was dumped illegally (*"basurales"*). In any case, the practice of open-air waste dumping created great health and pollution risks (World Bank report, p. 87-90). The creation of CEAMSE reduced significantly the number of *"basurales"* in the AMBA, even though the practice still continues.

[140] The number of municipal districts covered by CEAMSE has changed over time due to subdivisions of existing districts, creations of new districts, etc. When the company was created in 1979, CEAMSE encompassed 22 districts. Currently, it covers 34 districts (the list of districts is available at CEAMSE web site, http://www.ceamse.gov.ar/abre-home.html, cited March 30, 2010).

[141] Currently, the company is run by a board composed by three members. One of the members is appointed by the government of the province of Buenos Aires, and one by the city of Buenos Aires. The third member of the board is jointly appointed by both governments, but he/she is proposed by the government of the province of Buenos Aires (article 10; *Estatuto Social del CEAMSE*; available at http://www.ceamse.gov.ar/abre-home.html).

the waste treatment and disposal service in the territories of those municipalities, but without their involvement or control.

A main point of friction is the location and operation of the landfills. When CEAMSE was created, the province of Buenos Aires provided the land where the sites were to be located.[142] Basically, the provincial government expropriated these lands and gave them to the company. For many observers and actors involved in this issue, the process of creating CEAMSE can be explained only in the context of an authoritarian regime, which was able to unilaterally formulate a policy, in a top-down fashion, without the need to take into account or reach consensus with local actors (Suarez 1998, 22-26). However, with the return and consolidation of democracy in Argentina, and as the process of urban growth continued in the metropolitan area, the sites of the landfills ended up very close to new neighborhoods and urbanizations, and they became a focus of local complaints and mobilizations.

By 2003, CEAMSE had four main landfills: Villa Domínico, Gonzales Catán, Norte 3 and Punta Lara. Each one of these landfills served a specific part of the metropolitan area.[143] The decision to close Villa Domínico (the largest landfill in Argentina and the oldest in operation in the AMBA) implied that the waste being disposed in that site had to be placed somewhere else. In that context, CEAMSE began assessing the possibility of redirecting at least part of that waste to the Punta Lara landfill.

[142] For many observers, the implicit purpose for the creation of CEAMSE was to solve the waste problem of the city of Buenos Aires. The central city lacked physical space to dispose the waste (or rather, land was too valuable to be used as landfill). Furthermore, by "exporting" its waste (as well as forcing the relocation of slums to metropolitan districts, banning polluting industrial activities, etc), the central city could strengthen its residential features in detriment of the surrounding municipalities (see Suarez 1998, 22-26).
[143] Villa Domínico served the city of Buenos Aires; (by far, the largest producer of waste in the AMBA) and several municipalities in the south of the AMBA; the Gonzales Catán landfill served the west part of the AMBA; Norte 3 served the districts located in the north of the AMBA; finally, the Punta Lara landfill served the city of La Plata and the surrounding counties (Berisso, Ensenada, Brandsen).

As mentioned above, this triggered a strong local opposition in Ensenada. There was a widespread fear among the local community that CEAMSE's supposedly transitory measure would become permanent, and it would lead Punta Lara to become a second Villa Domínico.[144] The local governments of Ensenada and other nearby cities (Berisso, La Plata) were also concerned about CEAMSE's measure.[145] A main argument used by the local groups was that CEAMSE was not fulfilling the existing legislation regulating CEAMSE's waste treatment and disposal service in the metropolitan area. The "new" waste coming to Punta Lara originated in towns and counties that were beyond the maximum distance established in law 9111/78. Article 4 of that law explicitly states that the waste ought to be disposed in landfills which are to be located at a maximum distance of 20 kilometers from the limits of the counties where the waste originates.[146] In support of this argument, the city council of Ensenada passed resolution 2843/03, reproducing article 4 of the law 9111 and banning the entry of trucks to the Punta Lara landfill with waste originating in counties located beyond the 20 kilometer rule.[147] However, and

---

[144]See for instance, the coverage of El Día, a regional newspaper from the city of La Plata, about the local reactions to CEAMSE's measures ("'No queremos convertirnos en basurero del conurbano' Lo dijeron vecinos que anoche se reunieron en Ensenada por el CEAMSE de Ensenada"; April 2, 2003; "El problema de la basura se debe resolver y no mudarlo a otro lado" , April 6, 2003; "Nuevo rechazo vecinal al traslado de basura al CEAMSE de Ensenada"; April 8, 2003).

[145] El Día, "Fuerte oposición a la idea de traer más basura al CEAMSE. Preocupa la iniciativa de ubicar los desperdicios del Conurbano en el predio de Ensenada" (March 30, 2003). Also El Día, "Nueva movida para frenar envío de basura a la región Se reunieron concejales de La Plata, Berisso y Ensenada para actuar en forma conjunta "(April 23, 2003).

[146] Provincial law 9111/78, article 4: *"La disposición final de los residuos mediante el sistema de relleno sanitario se efectuará únicamente por intermedio de "Cinturón Ecológico Área Metropolitana Sociedad del Estado" – (C.E.A.M.S.E.), y a medida que dicha Sociedad del Estado se encuentre en condiciones de recibir todo o parte de los residuos originados en el territorio de los Partidos involucrados y en lugares especialmente habilitados a tal fin,* ***dentro de una distancia máxima de veinte (20) kilómetros fuera de los límites del Partido en el cual fueran aquéllos recolectados****…".*

[147] The resolution was mainly a response from the local government to the growing social concern in Ensenada (interview with Marcelo Martinez, La Plata, May 4, 2008). Arguably, the local banning of trucks with "outer-jurisdictional" waste was a purely symbolic measure (its constitutionality was very debatable given that it openly contradicted the commerce clause). Nevertheless, it also entailed a clear political message to CEAMSE and the provincial government.

despite the local protests, CEAMSE gradually began disposing waste from other counties in the Punta Lara landfill.[148]

In regard to the provincial government, during the first months of 2003 the focus of the executive was on renegotiating with the city of Buenos Aires the terms under which the province would receive the waste produced by the city. In May 2003, the provincial Senate quickly approved a bill sent by Governor Sola, which authorized the executive to take measures to end the CEAMSE and negotiate a new agreement with the city of Buenos Aires. Furthermore, the bill banned the entry of waste from other jurisdictions into the province of Buenos Aires (a measure that clearly aimed to force the city of Buenos Aires to negotiate). However, the bill did not gain enough support in the House of Representatives, and a few weeks later, the governor announced he was desisting from pushing the proposal forward. At that point, the provincial government and CEAMSE were also advancing the idea of disposing waste from the AMBA somewhere outside the heavily urbanized metropolitan area.[149] This was rather a middle term solution, which required –first- to find municipalities willing to authorize CEAMSE to build landfills in their jurisdictions. Meanwhile, the provincial government tacitly supported CEAMSE's measure to dispose outer-jurisdictional waste in Punta Lara.[150]

In January 2004, CEAMSE reached an agreement with the new government of the municipality of Ensenada which arguably aimed to contain and soften the local

[148] It is worth clarifying that not all the waste from Villa Dominico was redirected to Punta Lara. The waste was distributed among the three CEAMSE's landfills (Noticias CEAMSE 2004).
[149] In 2003, CEAMSE published a plan of action for the next decade which included the building of new landfills in low urbanized areas during the next five years (see Fundación Metropolitana 2004) . See also El Día ("La provincia ya no sabe dónde tirar la basura", June 11, 2003).
[150] For instance, in the ceremony of closure of Villa Domínico, governor Sola explained to the press how the waste being disposed in that site was going to be distributed among the three others landfills, including Punta Lara (see, for example, Clarin, "Solá encabezó el acto de cierre del basural del CEAMSE en Villa Domínico", February 2, 2004).

opposition.[151] According to the agreement, the company would dispose waste from other counties in Punta Lara's landfill only for a year –until December 31, 2004. In return, CEAMSE committed itself to build a recycling plant in Punta Lara (which would create around 200 jobs in a region that suffered from high levels of unemployment), plus giving other financial benefits to the municipality of Ensenada. The most active local groups and NGOs, however, continued to oppose CEAMSE's policy of disposing outer-jurisdictional waste in Punta Lara.[152]

CEAMSE, meanwhile, began looking for potential sites for new landfills. The state company opened a bidding process to build a mega-landfill in the province of Buenos Aires.[153] Some local governments initially showed certain interest in receiving the landfill because of the economic and financial benefits that they would receive in exchange. However, there was a strong social opposition, including large social mobilizations, in the counties and towns that were being mentioned as potential sites of CEAMSE's landfills.[154] In that context, the bidding process for the new landfills did not advance, and CEAMSE announced that it could not fulfill the deadline set in the agreement signed with the municipality of Ensenada.

---

[151] In December 2003, Mario Secco became the mayor of Ensenada. Secco belonged to the Frente Para la Victoria (FPV), which was a political coalition lead by the Kichnerist faction of the Peronist party. The previous mayor, Adlberto del Negro, who held the office for 12 years, belonged to an opponent faction of the Peronist party.

[152] Interview with Marcelo Martinez (La Plata, May 4, 2008). See also the coverage of the local newspaper El Día ("Anunciaron construcción de una planta procesadora de residuos", January 9, 2004; "Vecinos de acuerdo con la planta procesadora de residuos", January 11, 2004).

[153] The bid encompassed the design, building and operation of a landfill for 20 years in a site of 300 hectares located within 150 km radius from the city of Buenos Aires. The interested companies had to obtain the authorization of the municipalities where they were proposing to build the landfill (for more information about the bid process, see Noticias CEAMSE 2005).

[154] See for instance, El Día ("Aceptar o no la basura ajena, debate que divide a Brandsen", March 16, 2004) regarding the situation in Brandsen, a town in the province of Buenos Aires, which was being mentioned as a potential site for a landfill. According to the journalist covering the issue, the local mayor was interested in this possibility because of the economic benefits it would entail for the municipality, while most of the local population rejected the proposal because of the potential environmental and health hazards.

On January 2005, the deadline expired and local protests in Ensenada increased again. For several days the local government did not allow trucks with outer-jurisdictional waste to enter the site.[155] Furthermore, neighbors' groups regularly carried out protests in front of the landfill gates as well as at the provincial government's headquarters in La Plata. Despite the local opposition, outer-jurisdictional waste continued to be disposed in Punta Lara. Moreover, at some point during 2005, CEAMSE also began enlarging the landfill, incorporating a new area known as module D.[156]

By the end of 2005, two of the most active local associations, Nuevo Ambiente and Centro Vecinal Punta Lara, filed a *recurso de amparo* against CEAMSE at a provincial district court ("Asociación Civil Nuevo Ambiente CEN. VEC. P. Lara c/ CEAMSE S.A./ Amparo -Expte 4559").[157] The plaintiffs basically asked the court to order CEAMSE to stop disposing waste in the Punta Lara landfill from jurisdictions beyond the 20 kilometers established by provincial law 9111/78. Moreover, they required CEAMSE to stop the works aiming to enlarge the landfill (module D), because they had not been approved by the environmental provincial agency and the expansion of the landfill was violating several federal and provincial environmental regulations. In March 2006, the court issued its resolution which favored the local associations. The judge, however, stated that the implementation of the plaintiffs' claims should be done gradually as to not jeopardize the provision of waste disposal services to the other counties of the

---

[155] The local government of Ensenada claimed that it was taking that measure because CEAMSE did not fulfilled the terms of the agreement. (El Día, "520 toneladas de basura sin destino cierto" January 4, 2005). CEAMSE, then, brought a legal claim against the municipality, and a district court ordered the municipality of Ensenada to allow the trucks into the landfill.

[156] CEAMSE claimed that module D did not constitute as an expansion of the landfill, but rather it was part of the original plan for the site (see statement of Carlos Hurt, the president of CEAMSE, in El Día "La batalla por la basura de la CEAMSE llega a la Justicia", April 20, 2005). In contrast, the local groups basically argued the amount of waste being disposed at Punta Lara was filling the existing capacity of the landfill at a higher speed than expected, which meant that the site had to be expanded so it could continue operating.

[157] *Juzgado de Primera Instancia en los Contencioso Administrativo Nro. 1*, Judge Luis F. Arias.

metropolitan area. Accordingly, the judge banned the disposal of outer-jurisdictional waste in Punta Lara from June 30, 2006 onward, and the disposal of any waste in module D of the landfill from October 30, 2006. It is worth noting that the banning of waste disposal in module D meant, in practice, that the Punta Lara landfill would stop operating because the existing capacity of the site was almost full.

As expected, CEAMSE appealed. The court of appeals (*Cámara de Apelación en lo Contencioso Administrativo de La Plata*) ratified the resolution of the trial court, even though it postponed the deadlines to September 30, and December 31, 2006 respectively.[158] CEAMSE, then, appealed to the Supreme Court of the province of Buenos Aires. While the judicial procedures were going on, CEAMSE continued disposing waste in the Punta Lara landfill based on the argument that the appeals procedures suspended the enforcement of the courts' resolution. Meanwhile, local protests continued. During the months of September/October 2006, the level of social tension and confrontation reached one of its peaks when groups of local residents blockaded the gate of the Punta Lara Landfill for several days, demanding the enforcement of the judicial resolution. [159]

---

[158] The resolution of the court of appeals was not unanimous. Two judges ratified the resolution of the trial court, and one favored CEAMSE's claim.

[159] The events developed during the blockade of September-October 2006 are clear indicators of the level the social tension as well as the lack of a clear exercise of political and state authority around this conflict. On September 30 (the deadlines established by the court of appeal for CEAMSE to stop disposing outer-jurisdictional waste in Punta Lara) groups of neighbors and local NGOs began blockading the gates of the landfill, and did not allow trucks transporting outer-jurisdictional waste to enter the Punta Lara landfill. CEAMSE's workers union, then, organized a counter-blockade and they stopped all trucks to get into the landfill affecting the disposing of waste from the towns and counties served by Punta Lara (Ensenada, Berisso, La Plata). The union was protesting that the closing of the landfill implied losing jobs, but for many observers it was clear that their action were promoted by, or at least had the tacit support of the company. On the fourth day of the blockade, the local mayor of Ensenada, leading a convoy of trucks full of waste from the town of Ensenada, and with the support of the workers from the local municipality, attempted to break the CEAMSE workers blockage. This led to a very tense situation and even some street-fights between people belonging to the two groups. Finally, the public criminal prosecutor from La Plata (*Fiscal Penal*) showed up at the site and resolved to enforce (with police support) the resolution of the court of appeals. As result, the trucks with outer-jurisdictional waste that were waiting outside of the site were not allowed to dispose their waste in the Punta Lara landfill. Only those trucks from Ensenada, Berizzo and La Plata were allowed into the site. CEAMSE, as expected, strongly criticized the actions of

In this context, the Supreme Court opened a process of negotiation which encompassed the local associations and the CEAMSE (the initial parties to the legal dispute), and also the government of the province of Buenos Aires.[160] By that time, the provincial government had already submitted a new bill to the legislature aiming to regulate the management of residential waste, including its treatment and disposal, in the entire province.[161] The bill was quickly treated and approved by the Senate (November 1, 2006) and by the House of Representatives (December 7, 2006). One of the most relevant (and most polemic) provisions of the new law 13.592 was article 12, which authorized the provincial executive to assign sites for the construction of landfills without the need for local governments' authorization. In this way, the provincial government attempted to unlock the problems of where to dispose the waste originated in the metropolitan area.

Based on the new law and after few months of negotiations, CEAMSE, the local associations from Ensenada and the provincial government reached a series of agreements which were approved by the Supreme Court on December 20, 2006.[162] Basically, CEAMSE committed itself to identify and purchase the sites for two new landfills, and begin the operation of the new landfills by December 2007. The landfill at Punta Lara would continue to operate until that date. The provincial government, in its turn, agreed to authorize the new landfills in accordance with the new law 13.592.

---

the public prosecutor, arguing that she ignored the ongoing appeal procedure before the Supreme Court (See El Día, "Otro duro round en la pelea por la basura", October 5, 2006).

[160] In October, 2006, the Court summoned the provincial government to be part of hearing with the parties (CEAMSE and the NGOs). In the hearing, which took place on October 20, 2006, all the parties agreed to formally begin a process of negotiation.

[161] The waste management project of the Sola's administration was publically known since 2005, but it was only submitted to the Senate on August 9, 2006.

[162] The overall agreement reached by the parties was composed by an agreement between the local associations and CEAMSE, an agreement between the provincial government and CEAMSE. A third agreement between CEAMSE and the municipality of Ensenada was also included in the judicial resolution ("Asociación Civil Nuevo Ambiente - Centro Vecinal Punta Lara c/ CEAMSE -Recurso Extraordinario de Inaplicabilidad de Ley- Letra A 68857").

A couple of months later, in February 2007, CEAMSE announced the counties which were considered to be potentially apt for the landfill sites: Brandsen and Campana. The local opposition, especially in Brandsen, was enormous, and included large social mobilizations and routes blockade.[163] Just a month later, and in response to the popular protests, the provincial House of Representatives and the Senate quickly approved a new law suspending the application of article 12 of law 13.592 for 6 months. In this context, the provincial government and CEAMSE announced that they could not fulfill their obligations under the terms of the agreements; the provincial Supreme Court, then, established new deadlines which were not fulfilled either. By 2009, when the first version of this chapter was written, the Punta Lara landfill was still operating and the process of judicialization still continued.[164]

Analysis of conditions triggering judicialization

As in the previous case, the first factor to analyze is whether the social opposition to CEAMSE's policy in Punta Lara can be considered as a loser of the policy process or not. On the one hand, it can be argued that the existence of landfills in some of the metropolitan districts was clearly the result of the existing policy and legislation regarding solid waste treatment and disposal in the AMBA, specifically provincial law 9111/78. As result, some districts (in this case Ensenada) had to receive the waste originated in other municipalities of the area. However, the social actors protesting against CEAMSE's policy and management in the Punta Lara landfill were mainly

[163] See coverage of the local newspaper El Día, "Brandsen endurece su reclamo contra el relleno sanitario" (February 19, 2007), "Crece en la Región el debate por la basura" (March 11, 2007)
[164] It is worth noting, however, that currently no outer-jurisdictional waste is being disposed in the Punta Lara landfill.

demanding the enforcement and application of existing legislation as well. Law 9111/78 not only establishes that the municipalities in the AMBA have to dispose their waste in landfills operated by CEAMSE; it also regulates the geographical origin of the waste disposed in each landfill through the 20 kilometer rule (article 4, law 9111/78). The local claim against the "outer-jurisdictional" waste being dumped in Punta Lara was based precisely on that legal mandate. Furthermore, local actors also protested for what they perceived as the lack of provincial government control over CEAMSE's landfill operations and lack of government enforcement of existing environmental legislation. For instance, CEAMSE began expanding the capability of the Punta Lara landfill (module D) without going through the environmental impact assessment procedure established by the provincial regulations and without requiring the authorization of the provincial environmental agency. More relevant, the provincial agency did not attempt to exercise its police power in light of CEAMSE's decisions. In sum, the demands of the local groups mainly referred to policy goals and measures that had already been approved through the conventional policy making venues, but were not being enforced by the provincial government.

In turn, the social actors protesting against CEAMSE's policy in Punta Lara were not politically disadvantaged although their capability to be part of the policy debate at the provincial level was rather limited. The core of the local opposition was embodied by the "a*samblea"*, a network of residents from Punta Lara and some local associations, mainly the Centro Vecinal Punta Lara (a well known neighborhood association) and Nuevo Ambiente (a local environmental NGO).[165] When the first news erupted about the

[165] Punta Lara is a small town located in the Ensenada county. According to the census data 2001 (INDEC), Punta Lara had 8.400 inhabitants, and the Ensenada county had an overall population of 51.000 people.

possibility of CEAMSE disposing outer jurisdictional waste in Punta Lara, this network of local residents and associations concerned about the issue was rather small, but as the dispute evolved, it began gaining the attention and support from the broader community in the Ensenada county and the region.[166] In March 2005, for instance, the *"asamblea"* delivered to the municipality of Ensenada a petition signed by 9.700 residents, requesting that the local government enforce local regulations that were allegedly being infringed by CEAMSE. Given that the whole population of Ensenada county was just over 51.000, the number of people who signed the petition gives a good idea of the level of concern raised by the Punta Lara issue among the local population and the capability of the *"asamblea"* to reach the local community. In this context, and although the relationship between the *"asamblea"* and the mayor of Ensenada was very conflictive,[167] the local government could not and did not ignore the local concerns and claims about the situation in the Punta Lara landfill (in fact, even the local mayor once blockaded the gates of the landfill, so the trucks with outer-jurisdictional waste could not enter the site!).[168]

At the provincial level -where the central locus of the policy process was, the capability of the local groups to influence the policy debate was more limited. As will be discussed below, the provincial government maintained a rather passive role in relation to CEAMSE's policy on Punta Lara and, hence, it did not engage the local groups in any substantial policy negotiations.[169] However, the local groups carried out different actions

---

166 Interview with Marcelo Martinez, one of the local leaders of the movement against CEAMSE and founder of the NGO Nuevo Ambiente (La Plata, May 4). The same point was made by Luis Malagamba, the former Ombudsman of the city of La Plata (La Plata, July 21).

167 For instance, on occasion of the deliverance of the signatures mentioned above, the event ended with fights between protesters and partisans of the local mayor (See El Día, "Crece la tensión en Ensenada por la pelea contra el basurero", March 12, 2005). Also Interview with Marcelo Martinez (La Plata, May 4, 2008).

168 See above, footnote 159 for a description of these events.

169 As explained above, this situation changed substantially after the judicialization of the dispute, which gave to the local groups a seat at the "negotiating table" on the future of the Punta Lara landfill, and required the provincial government to take a more active role in the policy process.

aiming to gain the attention of the provincial government and the broader public opinion about the situation in Punta Lara. For instance, in May 2004, the NGO Nuevo Ambiente filed a complaint to the national Ombudsman office, which was also signed by 800 residents from Ensenada, claiming that CEAMSE was infringing environmental legislation, and requesting the intervention of the office.[170] Similarly, in December 2004, the local groups delivered a petition to governor Sola, requesting to stop the disposal of outer-jurisdictional waste in the Punta Lara landfill.[171] The local groups also filed a complaint to the provincial agency in charge of protecting the quality of water resources, arguing that the Punta Lara landfill was polluting a nearby stream and the underground waters. The issue raised a lot of media attention after the agency announced that the stream was in fact polluted by lead and other metals (although the agency did not attributed the pollution to the landfill or any other source).[172] Besides the use of institutionalized modes of advocacy, the local groups also organized street mobilizations and, as it has been described above, they even took direct actions like blockading the gates of the Punta Lara landfill.[173] An aspect worth noting is that these groups were quite able to sustain their advocacy efforts through time, which arguably helped to place the issue on the public agenda. In short, the social actors protesting against CEAMSE's

[170] Diario El Día ("Nueva denuncia por la basura que llega a predio de CEAMSE", May 16, 2004)
[171] Diario El Día ("CEAMSE va a la justicia por la basura extra", December 18, 2004).
[172] See the regional newspaper Hoy ("Admiten que la concentración de metales es superior a lo admitido", November 9, 2005).
[173] The *"asamblea"* organized several mobilizations to the headquarters of the provincial government in the city of La Plata (interview with Marcelo Martinez, La Plata, May 7, 2008)). Furthermore, several times they blockaded the gate of the Punta Lara landfill for few hours or days, stopping trucks with outer-jurisdictional waste for entering the site. It is interesting to note, however, that largest (in terms of the amount of people who participated) and the longest blockades occurred after the dispute was already judicialized. These blockades took place in September 2006, when CEAMSE did not fulfilled the deadline established by the court of appeals to stop disposing outer-jurisdictional waste in Punta Lara, and in October 2007, when CEAMSE and the provincial government did not fulfilled the agreements signed before the Supreme Court.

policy in Ensenada were somewhat able to access and be part of the policy process and debate around the Punta Lara landfill.

In its turn, the provincial government basically let CEAMSE carry out its policy regarding Punta Lara. While the executive did not openly support CEAMSE's decision to dispose outer jurisdictional waste in Punta Lara or to expand the landfill capabilities, the government neither exercised its policy power of control nor attempted to enforce the existing legislation over the company. Based on the evidence we have gathered, one can hypothesize several different arguments for explaining this government's policy. First, it can be argued that the policy priority for the administration of governor Solá was the closure of the Villa Domínico landfill (a measure that was announced and postponed several times for different previous provincial administrations). The disposal of outer-jurisdictional waste in Punta Lara, then, was more or less a natural and expected side-effect of that measure. Second, the opening of new landfills to dispose the waste from the metropolitan area was extremely difficult and costly in political terms. Arguably, it was more convenient for the provincial administration at the time just to keep bringing new waste into Punta Lara (even with the opposition of already critical local groups), and pass the problem to the next administration, than to trigger new focuses of social conflicts and resistance in other parts of the province.[174] Regardless of the reasons, it is clear that the relative passivity of the provincial executive implied a tacit ratification of CEAMSE's policies and of the existing state of affairs on the Punta Lara landfill.

The government became more openly involved in the policy process after the dispute got judicialized and the district and appeals courts ordered the Punta Lara landfill to be closed because its capacity was full. These judicial decisions greatly affected the

[174] This is a process is commonly known in policy studies as NIMTO: Not In My Term Of Office.

dynamic of the policy debate and the timing of the policy process. Arguably, they "forced" the government to address the issue earlier than what they expected to. If the Punta Lara landfill had to be closed, what was going to happen with the waste (intra and outer jurisdictional) that was being disposed of there? Where was that waste going to be placed? These questions raised policy issues that clearly went beyond the Punta Lara landfill and affected the waste disposal policy of the entire Metropolitan area. In this context, and under the pressure of the judicial orders to close the Punta Lara landfill, the government then promoted and got the provincial legislature to approve the law 13.592 on residential waste management in a few weeks, after years of executive and legislative inaction on the matter. Several speeches during the legislative debate made precisely made that point (own translation from Spanish): *"...We are going to approve the bill in general because we know of the urgency the executive has in solving the problem of Ensenada in the term of a year, given the agreements made with the Supreme Court of Justice..."* (Deputy Aispuru, Peronist dissident, Diario de Sesiones de la Cámara de Diputados de la Provincia de Buenos Aires, December 7, 2006, p. 7711); *"...the true is that Ensenada collapses because there is a judicial decision; and then, because Ensenada collapses, we make a law..."* (Deputy Gobbi, UCR, p. 7716). As these speeches stress, the sudden activism of the executive in this matter was largely in response to the involvement of the courts.

Meanwhile, the role of the provincial legislature in the policy process and debate around the Punta Lara landfill can also be characterized as rather passive. Throughout the period analyzed in this work (broadly 2002 to 2007), both houses of the provincial legislature were largely controlled by the Peronist party, which also controlled the

executive.[175] During this period, several bills were introduced by members of the legislature dealing with the issue of waste management in general. The interesting phenomenon is that many of these bills were approved by one of the chambers of the provincial legislature, but then elapsed in the other chamber's commissions without being treated. Moreover, when approved, these bills gathered a broad political support that crossed party lines. For instance, in December 2001, the provincial Senate unanimously approved a bill authored by senator Genoud (Peronist party), which later "died" in the House of Representative after one year without being treated.[176] In May 2003, the Senate again approved unanimously a bill sponsored by Senator Carlos Diaz (Peronist party), which reproduced senator Genoud's bill.[177] However, after a year, the bill died again in the House's committees without being considered. In December 2004, this time the House of Representatives approved, unanimously, a bill sponsored by deputy María Fernandez (Peronist party), which was largely based upon senator Genoud's bill.[178] The bill, however, expired in the Senate.

There are no easy explanations for the behavior of the legislature. Clearly, the lack of legislative decisiveness was not due to differences between the political parties (in fact, the Peronist and main opposition parties voted in favor of these bills when they reached the floor). Similarly, there were not main policy differences between the bills approved by the Senate in 2001 and 2003, and the bill passed by the House in 2004 (indeed, all of them share the same policy core).[179] In this regard, it is interesting to

[175] In fact, the Peronist party had controlled the government of the province of Buenos Aires for most of the time since the return to democracy in 1983. The UCR was in charge of government for a brief period (1983-1987), but after that, the Peronist party had always held the provincial executive.

[176] Bill E-71/01-02 (Diario de Sesiones del Senado de Buenos Aires, December 27, 2001, p. 2816-2817).

[177] Bill E-17/03-04 (Diario de Sesiones del Senado de Buenos Aires May 8, 2003, p. 306-307).

[178] Bill D/525/03-04. In her speech in the House's plenary, deputy María Díaz explicitly stated that her project was largely based on Genoud's bill (see Diario de Sesiones de la Cámara de Diputados de la Provincia de Buenos Aires, December 22, 2004, p. 6150-6151).

[179] The policy core of these bills was basically the same: i) they banned open air dumps in the entire province (at that time, open dumps were only banned in the metropolitan area); this was a measure that

transcribe a piece of Senator Díaz's speech during the Senate session, which stressed the lack of apparent reasons for explaining the inaction of the provincial assembly regarding these bills (own translation from Spanish): *"...and we do not understand the reasons why this bill was repeatedly deferred by the House of Representatives, even though the differences between the legislative blocks have been overcome and a consensus has been reached among all the political sectors represented here..."* (Diario de Sesiones del Senado de Buenos Aires May 8, 2003, p. 306-307).

Alternatively, one can hypothesize that the performance of the legislature on this issue can be explained in terms of short term costs vs. long term benefits. Arguably, the proposed changes in urban waste policy were likely to generate positive socio-environmental consequences only in the middle or long term, while the costs of those policy reforms for local government and residents would occur in the short term. In this context, the different legislative blocks and sectors just let the issue flow back and forth through the legislative agenda and procedures without an explicit and open opposition but without a definitive and strong support neither. Implicitly, the legislature was allowing for the status quo to continue.

Whatever the reason was, the legislature finally overcame its inaction when it approved law 13.592/06 on waste management. As explained above, this bill was forcefully promoted by the executive in order to fulfill with the agreements made at the provincial Supreme Court of Justice and under the threat of a judicially -order closing of the Punta Lara land fill. The executive, then, introduced the bill in the legislature on August 9, 2006, and less than six month later, it was already approved by the Senate (November 1, 2006) and by the House of Representatives (December 7, 2006). A sharp

---

raised some resistance among local governments because it was costly to implement; ii) they allow and encourage municipal governments to take recycling and waste reduction measures (for many observers, this type of policy measures were generally resisted by CEAMSE because it affected it waste disposal business); iii) they did not directly address the CEAMSE; the company was left intact and working.

contrast when compared to the legislative passivity that characterized the treatment of the previous bills. Clearly, the strong leadership and involvement of the executive in the legislative process was the key factor for the quick legislative response.[180]

In contrast, state capacity issues did not play a significant role in the unfolding of the policy conflict around CEAMSE's policy in the Punta Lara landfill. The lack of enforcement of the 20 km. rule established by law 9111/78 was not due to deficiencies of the state apparatus but, as explained above, to the political preferences of the provincial government, who basically let CEAMSE carry out its policy towards Punta Lara. The same can be argued in relation to the lack of state authorization and control over CEAMSE's expansion of the Punta Lara landfill. In fact, the availability of resources and technical capability of the provincial environmental agency to perform those basic tasks was not an issue in the policy debate, even though the lack of exercise of the state's police power was a main complaint of the social groups protesting against CEAMSE.

Summing up, the judicialization of the Punta Lara dispute occurred in a political scenario in which the provincial government tacitly supported CEAMSE's policies and management towards the Punta Lara landfill even though the company was infringing the applicable legislation, and the provincial legislature was rather passive and unwilling to open the policy debate about where to dispose the waste from the metropolitan area. This led to the judicialization of the dispute around CEAMSE's policy in Punta Lara even in a

[180] It is worth noting, however, that law 13.592 did not gain the same broad political support as the previous bills (when they were approved by one of the houses). In this case, law 13.592 was approved with the support of the FPV (the governing electoral coalition led by the Kichnerist faction of the Peronist party), the Peronist dissidents, and some other smaller legislative blocks (the PAUFE and the PRO). Two of the main opposition parties, the UCR and the ARI, voted against the bill mainly because of the provision that allowed the provincial executive to assign sites for landfills without the intervention of the local governments (article 12).

context in which the involved social actors were relatively able to access the policy process and voice their concerns and the state apparatus was capable of enforcing the existing legislation.

RE-NEGOTIATION OF PUBLIC UTILITY TARIFFS

In January 2002, in the context of one of the most acute economic, social and political crises affecting Argentina since the return to democracy in 1983, Senator Eduardo Duhalde was appointed interim president by the national legislative assembly.[181] The new administration quickly got congress to approve law 25.561, which declared a broad administrative, economic and financial emergency, and radically changed the existing economic and financial policy framework by ending the convertibility regime.[182]

The emergency law greatly impacted on the public utility services sector. Tariffs, which were previously tied to the US dollar, were converted to Argentine pesos at a rate of one-to one, and they could not longer be indexed to foreign inflation.[183] The law also authorized the executive branch to renegotiate the contracts with the privatized public utility companies,[184] and created a legislative bicameral commission (*Comisión*

---

[181] Senator Duhalde was one of the main leaders of the Peronist party, which was the main opposition party during the presidency of Fernando de La Rua (coalition UCR - FREPASO). In December 2001, President Fernando de La Rua renounced in middle of massive social protests against the government's economic policies. During the following few weeks, the office of the presidency changed hands several times creating even more uncertainty about the direction of the country. Furthermore, the argentine state had declared itself in default and the economy was into a deep recession. In this context, Senator Duhalde (who had been the Peronist candidate running against de La Rua in the 1999 presidential campaign) was appointed interim president as a result of a broad political agreement between the Peronist party, the UCR, FREPASO and other parties with legislative representation.

[182] The convertibility regime was established in 1991. Basically, it legally guaranteed the exchange of Argentine pesos to US dollars at a one-to-one fixed rated. Moreover, it limited the printing of additional currency (pesos) only to amounts supported by the government's reserve in dollars.

[183] At the same time, the Argentine peso was devaluated. In few days the US dollar reached 3 Argentine pesos, while the tariffs had been converted to pesos at a 1 to 1 exchange rate.

[184] The emergency law (article 9) also mandated that the government should take into account the following five factors when renegotiating the public utility contracts: i) the impact of tariffs on the competitiveness of the economy and the distribution of income, ii) the quality of services, iii) the interests

Bicameral de Seguimiento) to monitor, verify and make pronouncements about the actions carried out by the executive.[185] As expected, the public utility companies strongly reacted against the tariffs' *"pesificación"*. Most of the public utility sector was privatized during the 1990s, mainly to foreign companies and investors. Basically, the companies claimed that the *"pesificación"* and freezing of the tariffs affected their returns on the investments already made and, moreover, it discouraged much needed further investments in the sector. The companies' complaints were backed by international financial institutions and the governments from the countries where the companies were based. Both international financial institutions and foreign governments also began to heavily lobby Duhalde's administration to increase the tariffs.[186]

On February 12, 2002, the government issued decree 293/2002, signaling the beginning of the re-negotiation of the contracts with the public utility companies. The decree stated that negotiations were to be centralized under the minister of economy, who would have 120 days to produce the new contract proposals. The decree also created a commission (*Comisión de Renegociación de Contratos*) which was in charge of advising and assisting the minister of economy during the process of re-negotiation; the decree also established that one member of the commission should be a representative of the consumers' associations (article 4). The government, however, was reluctant to incorporate the NGO's representative in the negotiation, and especially, to grant access to

---

of the users and the accessibility of services, iv) the reliability of the services and iv) the profitability of the companies.

[185] Article 20 of the law also stated that the commission will be formed by six senators and six deputies based on a proportional representation of the different parties with legislative presence. Moreover, the chair of the commission will be proposed by the main opposition party in congress.

[186] See for instance, the coverage of La Nación which recounted a phone call from president Aznar (Spain) to president Duhalde, interceding on behalf of the Spanish companies with investments in Argentina while the Argentine congress was still discussing the emergency law (La Nación, "En España reniegan del plan de Duhalde", January 6, 2002).

the information provided by the public utility companies.[187] Only by the end of April 2002, after several formal protests made by the consumer groups, Ariel Caplan -the representative elected by the NGOS, was finally appointed as a member of the commission.[188]

The executive also attempted to reduce the involvement of congress in the public utility contracts renegotiation. Decree 293/02 stated that the bicameral legislative commission established by the emergency law has to be informed by the executive about the development of the negotiations and the contracts' reforms, but the opinions of the legislative commission were not binding. This triggered a negative reaction in congress, even among the Peronist legislative blocks.[189] In fact, several Peronist legislators initially submitted bills to congress declaring that the opinions of the legislative commission were binding, and these proposals raised support among the opposition parties. However, when the issue was treated by the plenary of the House of Representative, the Peronist legislative block did not provide quorum and the proposals to give more involvement to congress in the re-negotiation process lapsed.

Meanwhile the public utility companies were heavily lobbying the government to readjust the tariffs. During those months, several companies declared themselves, or threatened to declare themselves, in default.[190] Furthermore, it was claimed that without tariff increases, the companies would not be able to guarantee the provision and the

---

[187] On March 18, 2002, the minister of economy issued resolution 20/2002, which detailed all the information that the public utility companies had to provide for the re-negotiation process. That information had to be submitted to the commission.

[188] However, the appointment of the consumer representative did not solve the problem of the lack of access to the information about the re-negotiation. Only after a judicial order ("Caplan, Ariel Orlando c/EN - Ministerio de Economía - Res. 20/02. Medida cautelar (Expte 127.160/2002)") , the government granted Caplan access to the information provided by the companies according to resolution 20/2002. For more details about the NGOs efforts to participate in the negotiation process, see the Proconsumer's reports (available at www.proconsumer.org.ar/actualidad/renegiciacion_de_loscontratos.htm) .

[189] La Nación ("El Congreso procura incidir en la discusión sobre tarifas públicas", March 30, 2002)

[190] La Nación ("Los servicios públicos al borde del default. Metrogas es la primera privatizada que no paga su deuda", March 26, 2002)

quality of the services.[191] The international pressure was also increasing; tariff adjustment was one of the main conditions of the IMF to grant new funds to the Argentina state.[192] By August, the government had openly announced that there will be increases in public utilities tariffs.[193] Public hearings to consider tariff changes in water, energy and gas services were scheduled to take place during September 2002. The government made efforts to distinguish and separate the issue of the tariff adjustments from the renegotiation of the public utility contracts. It argued that the re-negotiation of the contracts was a long-term process, with long-term policy implications, which could not be resolved by the Duhalde administration which was an interim government.[194] The tariff adjustment, instead, was an emergency measure aimed to avoid the collapse of the public utility services.[195]

---

[191] See, for instance, the statement of the association of energy transporting companies -ADEERA- (La Nación, "Distribuidoras de energía eléctrica renovaron presiones para subir tarifas", August 12, 2002).

[192] For instance, see the following paragraph in the Proconsumer's report describing the claims of the IMF mission visiting Argentina in August/September 2002 (own translation from Spanish): *"...On September 6, 2002, in his last day in Argentina, the chief of the IMF mission, John Thorton, requested the government to move forward the schedule for the public utility tariff increases. The request was based on two reasons: First....[Second] the countries where the companies are from, have a lot of leverage in the directory of the IMF..."* (www.proconsumer.org.ar/actualidad/renegiciacion_de_los_contratos.htm). See also media coverage in La Nación ("El FMI aconsejó aumentos tarifarios", October 4, 2002; "El FMI insiste: mayor suba de tarifas", October 23, 2002; "Lavagna viaja hoy a EEUU para firmar con el Fondo. Se comprometerá a cumplir un cronograma de suba de tarifas y desregulación cambiaria", October 30, 2002).

[193] The minister of economy, Roberto Lavagna, affirmed that the increases would not be higher than 10% (La Nación, "Admitió Economía que habrá aumentos de tarifas", July 9, 2002). On August, the companies submitted their request for tariff increases; the requests varied depending on sector and type of coverage, but most increases ranged between 30 to 65% (La Nación, "Las privatizadas piden alzas del 9% al 493%", August 24, 2002).

[194] On September 2002, the government issued decree 1893/02, extending the deadline for the renegotiation of the public utility contracts for almost a year. In that way, the Duhalde administration made sure that the renegotiation of the contracts would be resolved by the new incoming administration.

[195] See Lavagna's statement regarding the differences between tariff adjustments and the re-negotiation of contracts: *"...one thing is the renegotiation of the contracts, which is a long term process, and another thing is the adjustment of the tariffs, which is to face the emergency..."* (La Nación, "Privatizadas: La renegociación le quedará al próximo gobierno"; September 18, 2002). Also, see Duhalde's claim that his government was an interim administration (La Nación, "Tarifas: Duhalde defendió la suba"; December 15, 2002).

Consumer groups and other social actors strongly rejected the government's policy of increasing tariffs. A main argument was that the population was already suffering a very hard economic situation and could not afford tariff increases.[196] Furthermore, utility companies had extraordinary levels of profits during the 1990's and, therefore, any higher costs in the provision of services resulting from the *pesification"* should be faced by the companies not by the consumers.[197] Finally, they claimed that changes in the tariff schemes had to be a part of the comprehensive re-negotiation of the public utility contracts -which included other items such as investment plans and quality of services-, as it was established by the emergency law approved by Congress.[198]

During August and September, the social opposition to the government's policy on tariffs grew strong. Besides the consumer associations, other social actors such as the CTA (*Central de Trabajadores Argentinos*), different groups belonging to the *"piqueteros"* movement, small and medium business associations and other groups, openly opposed to potential increases in public utility tariffs. Street mobilizations and other type of collective protest against tariff increases were carried out in Buenos Aires and other parts of the country.[199] A few days before the first of the public hearings organized by the government to discuss tariff increases, a group of consumer associations and the ombudsman office of the city of Buenos Aires filed a claim against the national

---

[196]In fact, large sectors of the population were not even able to pay the current tariffs' level at the time. For instance, phone companies cut services to 300.000 users during the first months of 2002 because they were not paying their bills (La Nación, "Se dieron de baja en el último trimestre 300.000 teléfonos"; March 17, 2002).

[197] During the convertibility regime, many utility companies took loans in US dollars in the international financial market because it was cheaper than in the Argentina's financial markets. With the *"pesification"* of the tariffs, the companies had now incomes in argentine pesos but debts in US dollars. This higher financial cost was one of the main arguments made by some companies to justify their requests for tariff increases.

[198] The main issues raised by the consumer associations are summarized in a six point memorandum submitted by the consumer representative Caplan to the commission of contract renegotiations ("Seis Puntos Básicos para la Renegociación de los Contratos de los Servicios Públicos", available in the Proconsumer Report).

[199] La Nación ("Apagón contra el aumento de tarifas", September 24, 2002)

government in a federal district court ("Unión de Usuarios y Consumidores y Otros c/ Ministerio de Economia e Infraestructura -Resol 20/20 Amp. Proc. Sumarisimo (causa 162.765/02)").[200] Basically, the plaintiffs claimed that the public hearings had not been convened according to the proper legal and administrative regulations, and were organized just to consider tariff increases. They requested the judge to order the government to renegotiate the public utility contracts according to the procedures and criteria established by the emergency law 25.561. Furthermore, as a provisional remedy while the legal procedure was pending, the plaintiffs asked for the suspension of the hearings. A few days later, the judged granted the provisional remedy, stating that the hearings were convened exclusively to consider tariff adjustments.

Facing the judicial suspension of the public hearings, the government modified its strategy and attempted to directly increase the tariffs by executive decree. On December 2, 2002, the government issued decree 2437/02, and raised the tariffs on gas and energy. The national ombudsman, in coordination with the consumer associations, filed a new legal claim against the decree issued by national government ("Defensoria del Pueblo de la Nación c/ Poder Ejecutivo Nacional" 2002). Basically, the plaintiff argued that the government decision to increase the tariffs was violating the emergency law passed by congress, and requested that the court suspend the tariff increase as a provisional remedy when the legal procedure was pending. The government, in turn, justified the decree as an emergency measure aimed to adjust the tariffs in order to guarantee the provision and quality of the services. On December 12, 2002, the judge granted the provisional remedy and suspended the application of decree 2437/02.

The government then took a more radical approach. On January 23, the Duhalde administration issued a necessity and emergency decree (*decreto de necesidad y*

[200] The claim was filed at Juzgado Federal contencioso administrativo # 3 of the city of Buenos Aires, Judge Claudia Rodríguez Vidal.

urgencia) which expressly modified emergency law 25.561, allowing the government to issue temporary tariff increases while the processes of contractual renegotiation were pending (decree 120/03).[201] The government then increased the tariffs for gas and energy (decree 146/03). As expected, several legal actions were brought against the government's measures. On February 25, 2003, a federal district court suspended the tariff increases based on a legal claim filed by the consumer groups ("Unión de Usuarios y Consumidores y Otros c/ Ministerio de Economia e Infraestructura -Resol 20/20 Amp. Proc. Sumarisimo" 2003). A few days later, another federal district court also suspended the increases based on a legal claim filed by the national ombudsman office ("Defensor del Pueblo de la Nación c/ EN PEN - Dec 120/03 s/proceso de conocimiento - incidente medida cautelar (causa 369/2003)" 2003). In both cases, the courts rejected the government's justification to exercise legislative power belonging to congress. Furthermore, the courts affirmed that, according to emergency law 25.561, any revision of the tariff schemes had to be a part of the comprehensive re-negotiation of the public utility contracts.[202]

[201] A necessity and urgency decree (*decreto de necesidad y urgencia*, also known as DNU) is a special kind of decree issued by the executive. Unlike regular decrees, DNUs have the force of law. In this way, DNUs represent an exercise by the executive, of legislative power belonging to congress. The executive power to issue DNU was established by the constitutional reform of 1994 (although previous administrations had already issued this type of decree). Article 99 (c) of the Argentine constitution states that DNU can be issued only under exceptional situations, when it is not possible to follow the normal procedure to create laws in Congress. In addition, the President cannot sanction DNU's legislating about criminal, tributary or electoral matters.

[202] However, it is worth mentioning that there was one judicial resolution which did not suspend the tariff increases based on DNU 120/03 ("Defensoria del Pueblo de la Ciudad de Buenos Aires c/ Ministerio de Economia" 2003). In this case, the judge did not resolve the plaintiff's request to suspend the tariff increase. Instead, the judge ordered the government to provide information about the process of renegotiation with the public utility companies. Implicitly, the court's resolution was allowing the government to increase the tariffs. Nevertheless, the tariff increases were suspended by the other resolutions mentioned above.

By March and April of 2003, Argentina was fully into the presidential campaign. Duhalde had already announced that he was not going to run for president, and the issue of the public utility tariffs was left to be resolved by the incoming administration.

Analysis of conditions triggering judicialization

The social opposition to the public utility tariff increases was not a strict loser of the policy process. Law 25.561 was relatively clear when stating that any changes in the public utility tariffs ought to be part of the general renegotiation of the public utility contracts. The different government's attempts to increase the tariffs independently of the contracts' renegotiation were criticized by the consumer groups and their allies as violating the emergency law approved by congress. Even the government –implicitly- recognized that it was not fulfilling the existing legal framework when it tried to modify the emergency law by a necessity and urgency decree (DNU 120/03), which would have allowed the executive to modify tariffs while the contract renegotiations were pending. In short, the consumer groups and their allies were basically demanding the government to apply the existing legislation when dealing with the issue of public utility tariffs.

In relation to the political leverage of social groups opposing the tariff increases, they were relatively able to access and be part of the policy process. Decree 293/02 stated that consumer groups had to be part of the contract renegotiation commission. Although, at first, the government did not facilitate the participation of the consumer representative, the consumer associations were finally able to be part of the commission and to access to the information, which strengthened their position as active players in the policy process. They had access to government officials working on the matter, and even met with the

minister of economy to discuss the issue of the tariffs.[203] In my interview with Ariel Caplan, the consumer representative in the *Comisión de Renegociación de Contratos,* he outlined how the participation in the commission gave them a position of relative authority in relation to the public utility companies and other governmental agencies involved in the process: *"...at the beginning we did not know much about the public utility contracts and the negotiations* (there were over 50 different contracts)*...but we learned a lot....we gathered a lot of information……, the companies came to talk with us...it is easier when you are in a situation of relative power... "* (Interview with Ariel Caplan, Buenos Aires, April 8, 2008).

Moreover, the opposition to the tariff increases was composed not only by consumer associations but also by a broad range of social actors such as unions (especially the CTA), business associations, *"piqueteros"* groups, etc.[204] The national ombudsman office and the ombudsman of the city of Buenos Aires were also actively involved in the dispute about the tariffs. More generally, public opinion was also largely against any increases in tariffs given the broad and acute economic crisis affecting the country. Finally, the policy conflict was widely covered by the national media, which helped raising public attention about the issue, and arguably, strengthened the capability of the groups opposing the increases in the tariffs to voice their arguments and critiques against the government's policy.

In relation to the role of the executive, the government clearly supported the tariff increases but it was not willing to carry out a full re-negotiation of the public utility contracts. As described above, a main argument developed by the Duhalde administration

[203] See for instance, the media coverage of the meeting between the consumers' associations and the minister of economy at the end of May, 2002, when the first news about tariffs increases were leaked to the public (La Nación, "Deciden no aumentar las tarifas de servicios; May 30, 2002).
[204] Interview with Ariel Caplan (Buenos Aires, April 8, 2008).

was that they were a transition government; a full re-negotiation of the public utility contracts implied taking long-term policy decisions that ought to be made by a newly democratically elected government, with full electoral legitimacy and a clear policy mandate. In fact, the government extended the deadlines for the re-negotiation of contracts (which in practice meant that the contracts would be re-negotiated by the incoming administration), while at the same time it was attempting to raise the tariffs in the short-term.[205] The government justified its policy decision to increase the tariffs on the need to maintain the quality of the services provided by the public utility companies, which were arguably harmed by the *pesification* and freezing of the tariffs. Furthermore, the government's policy can also be explained as a result of the lobby of the foreign governments and international financial institutions, especially the IMF, which included the issue of tariff increases among the conditions for granting financial aid to Argentina. Whatever the reasons, it is clear that government supported the increase of the public utility tariffs, while at the same time it did not advance in the re-negotiation of the contracts.

The national congress, in its turn, played a relatively passive role in the dispute about tariff increases, allowing the executive to exercise its power in a quite discretionary way in order to pursue the tariff reform. As explained above, the emergency law 25.561 established a bicameral commission to monitor the public utility contract re-negotiation. However, when the government issued decree 293/02, it stated that the legislative commission's reports were not binding. In this way, the government attempted to reduce the involvement of congress in the issue. This triggered an initial negative reaction among the different legislative blocks, including the Peronist legislative block which, at

[205] La Nación ("Privatizadas: la renegociación le quedará al próximo gobierno", September 18, 2002).

the time, had a large majority in the Senate and a near majority in the House of Representatives. Several Peronist legislators, then, submitted bills declaring that the opinions of the legislative commission were binding, and these proposals raised support among opposition parties.[206] In this context, the Duhalde administration placed a lot of pressure on the Peronist legislators, especially through the Peronist governors, to align the Peronist legislative blocks with the government's policy in the matter.[207] A main argument used by the government was that the fate of the economic agreement with the IMF -which would allow the national as well as provincial governments to access badly needed new funds- was linked to an increase in the public utility tariffs.[208] At the end, the government was successful in its efforts to bring into line most of the Peronist legislators. When the bill granting more power to congress in the contracts re-negotiations was scheduled to be discussed in the plenary of the House of Representative, a large part of the Peronist legislative block did not provide quorum for the sessions, and the bill lapsed.[209] Similarly, the legislature did not react when the Duhalde administration issued the decree of necessity and urgency 120/02, exercising legislative power that belonged to congress.[210] Furthermore, the conformation of the bicameral commission established by

---

[206] There were seven bills related to this issue which were harmonized in one legislative project , file 4230-D-02 (online database of the Cámara de Diputados de la Nación Argentina).

[207] It is worth remembering that the Duhalde's administration did not fully control the Peronist legislative blocks in congress. Instead, the individual legislators were much more sensible to the political needs of the governors of their provinces, who were their more direct political bosses.

[208] See media coverage in La Nación ("Respaldo de los gobernadores para acordar con el FMI"; November 18, 2002; "Pacto para avanzar por decreto en las tarifas", November 19, 2002). Also, PROCONSUMER report (available online www.proconsumer.org.ar/actualidad/renegiciacion_de_los_contratos.htm).

[209] See the congressional record of the House of Representative session on August 28, 2002 (Diario de Sesiones de la Honorable Cámara de Diputados de la Nación Argentina, 13a Sesión Ordinaria, item 4230-D-02, August 28, 2002). There were, however, some few Peronist legislators that still supported a stronger role for congress in the re-negotiation of the public utility contracts. For instance, see the statements of legislator Oscar Gonzales during that same legislative session.

[210] La Nación ("El Congreso no objetará la medida", December 1, 2002). It is worth noting that the Duhalde's administration issued the DNU 120/02 the day after the legislative ordinary period was over, and congress was beginning its extraordinary sessions. During the extraordinary sessions, congress can only treat the legislative agenda set by the executive, and the government did not include the DNU 120/02 as

the emergency law to monitor the contract renegotiation was delayed for several months. In fact, the commission's internal regulation, a basic legal tool needed for the commission to operate, was only approved by the end of February 2003,[211] more than half a year after the Duhalde government openly announced its plan to increase the public utility tariffs and began taking measures to that end.

Given that the Peronist party had control of the national legislature, it is reasonable to ask why the Duhalde administration did not attempt to get congress to modify the emergency law so as to allow the executive to directly raise the tariffs? A tentative response could be that the Peronist legislative majority was not willing to pay the political costs of voting in favor of a law raising tariffs in the context of a dramatic social and economic crisis, and with a presidential election coming soon. In any case, and whatever the reasons were, it is quite clear that the national congress played a rather passive role in the policy dispute about the public utility tariffs, allowing the executive interpret and apply the existing legislation in a discretionary way in order to achieve its policy goals.

Finally, state capacity issues were not relevant in the development of this policy conflict. Arguably, the economic crisis affecting Argentine at that time, and especially the government's need to access to the international financial markets, made the Argentine state more vulnerable to the lobby of the IMF and foreign governments. However, while international pressure may help explain why the Duhalde administration pursued the increases in public utility tariffs so vehemently, it does not speak to the capability of the state apparatus to regulate and control the public utility services. In fact,

---

part of the agenda. Arguably, this provided a formal justification for congress in general, and for the Peronist legislative majority in particular, to explain its lack of attention to the issue.

[211] See *Reglamento de la Comisión Bicameral de seguimiento de las facultades delegadas al Poder Ejecutivo Nacional - Ley 25.561* (2003).

the lack of re-negotiation of the public utility contracts was not due to deficiencies in the capability of the state to carry out those very complex technical negotiations, but to a political decision of Duhalde's administration. As mentioned above, Duhalde himself stated that the public utility re-negotiations should be carried out by a new, elected government and not by his interim government.

Summing up, the judicialization of this policy dispute occurred in a context in which the national government took measures to raise public utility tariffs but it was not willing to carry out a full re-negotiation of the public utility contracts as mandated by the national emergency law, and congress was rather passive on this issue, allowing the executive to exercise its power in a quite discretionary way in order to pursue the tariff reform. Under this political scenario, the dispute become judicialized even when the social actors opposing the tariff increases were relatively able to be part of the policy process and voice their concerns, and state capacity issues were not relevant in the development of the policy dispute.

A BRIEF ANALYSIS OF THE DISPUTE ABOUT INDIGENOUS PEOPLE'S LAND RIGHTS IN SALTA: THE LHAKA HONHAT CASE

Note: given that the chapter has already a considerable length, I do not develop a detailed, historical case study of this dispute like in the previous three cases. Instead, I provide a very brief summary of the main events that lead to the judicialization of the dispute.

This case refers to the claims made by Lhaka Honhat, an association of indigenous communities, for a collective land right over an area known as fiscal lots (*lotes fiscales)* 55 and 14 owned by the province of Salta. Fiscal lots 14 and 55 are

located in an area near the Pilcomayo River, in the northeast of the province of Salta. They are home to some 45 indigenous communities (between 6000 and 7000 people) belonging to five different ethnic groups who have been living in the area since time immemorial. The indigenous communities coexist with about 2600 *criollos* (non-indigenous population). This is a sparsely populated zone, with few signs of urbanization, covering about 650,000 hectares.[212]

In 1991, with the support of the Anglican church in Argentina and International Survival (an international NGO working on indigenous rights issues), the indigenous communities living in the fiscal lots created a legal entity, the association Lhaka Honhat, in order to be legally able to request a collective land title (Carrasco and Zimerman 2006); in July 1991, they formally submitted their request to the state of Salta.[213] By the end of that year, few days before finishing his term, the administration of governor Cornejo (Peronist party), made an agreement with Lhaka Honhat ratified by decree 2601/91, by which the provincial government agreed to grant a collective property right to the communities living in the fiscal lots, with no subdivisions and in a single title. With the change of government, the new administration of governor Ulloa (Salta Renovator Party) ratified the agreement and created a commission formed by experts and the interested parties to operationalize the agreement.[214] By 1995, the commission issued its report, making recommendations about how to distribute the land between the indigenous

---

[212]Data cited by the admissibility resolution of the Inter-American Commission on Human Rights (2006); also see (Carrasco and Zimerman 2006).

[213] At that time, indigenous communities were not recognize as legal entities; for that reason, they constituted this non - profit association called Lhaka Honha. When Lhaka Honhat formally submitted its request for a collective land title, the request also included a set of documentation such as a written history and map of the indigenous settlements and the economic uses of the territory. The work was done by a group of experts, many of which were closely linked with the Anglican Church in Argentina, and with the support of Survival International and ICCO (Inter Church organization for development cooperation). For an account of the process of producing this documentations see Carrasco and Briones (1996).

[214] The commission was formed by experts from the local universities (Salta Catholic university and National University of Salta), as well as with representatives from the government of Salta, Lhaka Honhat and the *criollos* families also settled in the lots.

communities and the *criollos* living in the area, and Ulloa's administration ratified it (decree 3097/95).[215]

However, time passed and the communities did not receive the land title. On the contrary, the Ulloa government began building a bridge over the Pilcomayo river and carrying out other infrastructural works, which allegedly affected indigenous communities settled in the area.[216] Moreover, in 1999, the government of Salta (at this time, under the administration of governor Romero, from the Peronist party) granted several individual property rights to *criollos* families and indigenous groups in lots 55 and 14 (decree 461/99). In that context, the indigenous association filed a *recurso de amparo* against the government's measure, which was rejected by the provincial courts, but finally was favorably resolved by the Argentine Supreme Court of Justice ("Asociación de Comunidades Aborigenes Lhaka Honhat c/ Poder Ejecutivo de la provincia de Salta -Recurso de Hecho" 2004). Previously, Lhaka Honhat had filed a claim before the Inter-American Commission on Human Rights (IACHR) in relation to the damages resulting from the construction of the bridge and other public works carried out by the provincial government.[217] In the context of this claim, in 2000, Lhaka Honhat,

---

[215] Basically, the commission recommended granting 2/3 of the lots to the indigenous communities in the form of community ownership, with no subdivisions, and a single title, and 1/3 to the *criollos* families. Decree 3097 ratified the recommendations, and it stated that the executive will submit a bill to the congress to grant the land according to the recommendations made by the commission. Moreover, it states that until that bill is approved, the fiscal lots 55 and 14 were declared areas of environmental protection and recovery.

[216] In August 1996, the chiefs of the indigenous communities decided to block the international bridge as a protest for damages caused in the indigenous settlement Misión La Paz, but more broadly for the lack of the government's response to their land claim. For 23 days, over 1000 indigenous people block the bridge. The blockade finished on September 16, when the chief minister of the administration of governor Romero visited the site and signed a memorandum of understanding with the indigenous communities, by which the government made the commitment to grant the collective land title in 90 days. However, after the 90 days, there were no advances regarding the regularization of the communities land tenure rights. For a detail description of the events in the bridge, see Carrasco and Briones (1996, 232-242).

[217] The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States (OAS), which receives, analyzes and investigates individual petitions which allege human rights violations. For more information about the IACHR and its quasi judicial procedure see the web site of the commission (www.cidh.org/what.htm).

the national government and the government of Salta began a friendly settlement proceeding at the IACHR with the purpose of solving the communal land right issue. However, by 2005, the government of Salta left the negotiating table, and began granting individual land titles again (Carrasco and Zimerman 2006). Accordingly, the legal procedure before the IACHR was re-opened and the judicialization of the dispute continued.[218]

Based on this brief summary, it can be argued that the indigenous communities were not losers of the policy process. In 1991, the government of Salta made a legal commitment (ratified again in 1995) to grant a collective land right to the indigenous communities living in the lots 55 and 14. The communities, then, were basically requesting that the state comply with an existing legal obligation. However, the measures needed to implement that commitment were not taken, and under the administration of governor Romero, the government of Salta openly began granting individual rights over the same land committed to the communities. In this scenario, the legislative branch of government played a rather passive and deferential role towards the executive on this matter. The provincial legislature was clearly not the venue in which this policy process and debate evolved.[219] Meanwhile, the indigenous communities forming Lhaka Honhat

---

The complain before the IACHR was the result of a long process of judicialization that began in 1995, with a *recurso de amparo* filed by Lhaka Honhat against the government of Salta, requesting the suspension of the public works and the bridge construction over the Pilcomayo river. The provincial courts ruled against the association, and Lhaka Honhat appealed to the Supreme Court of Justice, which in February 1998, also rejected its claim. At this stage, with the support of CELS, the indigenous communities filed their claim before the IACHR.

[218] In October 2006, the IACHR declared the Lhaka Honhat's petition admissible and began its examination of the merits of the case ("Report Nº 78/06. Petition 12.094 Admissibility. Aboriginal Community of Lhaka Honhat - Argentina" 2006).

[219] The only mayor intervention of the provincial legislature in this policy dispute occurred in July 2005, when it approved a bill submitted by the governor Romero calling for a referendum in the county where fiscal lots 14 and 55 were located. The Peronist party (the party of government) had a large majority in both houses, and easily approved the bill submitted by the executive. The residents were asked whether they agreed that the lands corresponding to fiscal lots 14 and 55 should be turned over to their current occupants. The question was intentionally broad and vague, and the result was (as expected) overwhelming in support of the YES. The government used the result to justify granting individual property rights to *criollos* and indigenous people living in the fiscal lots.

had the support of the Anglican Church and indigenous rights activists and organizations, which were critical allies in helping the communities to organize themselves and formalize their claims. However, the political leverage of the indigenous communities living the lots 55 and 14 was very limited. Their population was not significant in electoral terms;[220] furthermore, the provincial political elites were reluctant to recognize Lhaka Honhat as the monolithic voice of the communities, and individual indigenous groups and families were target of clientelists practices aiming to weaken their claim for an indivisible, collective land right.[221] Summing up, the judicialization of the dispute occurred in a context in which the provincial government was forcefully opposed to grant the collective land right as established by existing regulations, the provincial legislature was passive and deferential to the executive on this matter, and the involved indigenous groups had a limited political leverage.

CONCLUSIONS

The judicialization of the policy disputes analyzed in this chapter occurred under a similar, basic causal configuration. In all the cases, the social groups making claims on the state were not, in a strict sense, losers of the policy process. They were posing demands on the state that were based upon existing legislation, establishing relatively clear policy mandates that the governments were not fulfilling or enforcing properly. In the cases of Jujuy and Salta, the provincial states had taken clear legal commitments to transfer land rights to their indigenous communities, which were not implementing. In the

[220] 678.000 people were able to vote in Salta for the 2003 election for governor (source: Tow, Atlas de Elecciones en Argentina). Given that the entire indigenous population living in lots 55 and 14 is around 7000 people according to Carrasco and Zimerman (2006, 23) , we can conclude that the indigenous voters from this area easily represent less than 1% of the provincial electorate.

[221] See, for instance, several government measures denounced in the sub-headings 42-43 of the admissibility resolution of the Inter-American Commission on Human Rights (2006).

case of CEAMSE's management of the Punta Lara landfill, the government of the province of Buenos Aires was not enforcing the existing environmental legislation. Likewise, in the case of utility tariff increases, the national government was not complying with the emergency law, which clearly required a full re-negotiation of the public utility contracts.

In contrast to the cases analyzed in the previous chapter 3, the lack of implementation or enforcement of existing legislation in the cases examined in this chapter was not related to deficiencies in the state apparatus. In fact, state capacity issues were not relevant in the development of any of these policy disputes. Instead, the key political condition explaining weak implementation or enforcement was the opposition of the governments to comply with existing legal regulations. In the case of Jujuy, the provincial government not only was extremely slow in transferring land rights to the indigenous communities as mandated by the existing legislation, but also, through other agencies of the state, the government took measures that clearly contradict the goals of the indigenous land program. A similar situation occurred in the case of Salta, where the Romero administration did not take measures to transfer the communal land right to Lhaka Honhat as established by provincial norms, and instead, began granting individual property rights over the same land. Similarly, in the case of the public utility, the Duhalde administration made several different attempts to increase the tariffs independently of the contract renegotiations, even though the Emergency Law 25561 was quite clear when stating that any changes in the tariffs ought to be part of a general renegotiation of the public utility contracts. Likewise, in the case of the Punta Lara landfill, the provincial executive tacitly endorsed CEAMSE's decision to dispose outer jurisdictional waste in Punta Lara and to expand the landfill capabilities; therefore, the provincial government

neither fully exercised its policy power to control CEAMSE nor attempted to enforce the existing environmental legislation.

Furthermore, in all these policy disputes, the legislative assemblies were quite passive, they did not fully exercise their check and balance powers, allowing the executive to apply existing legislation according to its own policy preferences or even not to apply it at all. In the case of Jujuy, the provincial legislature clearly failed to exercise its oversight role over the government's implementation of the indigenous land program (PRATPAJ). This should not be surprising given that the party of the government, the Peronist party, also controlled the legislature. In fact, the Peronist party has controlled Jujuy's political and institutional system since the return to democracy in 1983. A similar situation occurred in the dispute about indigenous land rights in Salta, where the legislature –fully controlled by the party of the government- was aligned with the executive on this matter, and did not oversee the government's implementation of existing provincial norms. Likewise, in the dispute about the public utility tariffs, the national congress also played a quite passive role in relation to the executive throughout the policy process. The Duhalde administration reduced by decree the power of the bicameral legislative commission established by law 25561, limiting the involvement of congress in issues related to the public utility contract re-negotiations. Later, the government exercised power that belonged to congress when it modified law 25561 by a decree of necessity and urgency, and in that way, it attempted to open a window to raise the tariffs. In both situations, congress did not react limiting and containing the executive. Finally, in the dispute about CEAMSE and the Punta Lara landfill, the role of the provincial legislature can also be characterized as rather passive. As explained above, there were several bills about waste policy during the period we examined, but all lapsed in one chamber or another without being considered. Interestingly, this lack of legislative

decisiveness was not due to differences between the political parties. In fact, the Peronist party (which controlled the executive and the provincial legislature) and the main opposition parties, voted in favor of these bills when they reached the floor (but then, no party openly championed the bills when they were treated in the second chamber). The legislature only overcame its inaction and inefficiency when the provincial executive forcefully promoted a new bill on waste management (law 13.592/06), which one of its purpose was to help solving the situation in Punta Lara. By that time, however, the dispute around the Punta Lara landfill was already deeply judicialized.

In relation to the political leverage of the social actors involved in each of these policy disputes, there were some differences among the cases. In the Jujuy case, the local indigenous groups and its allies showed a high level of organized collective action and were able to be part of the policy making processes about the land tenure rights. A similar situation occurred in the dispute about the re-negotiation of the public utility contracts, where the consumers associations had a relative direct access to the policy process. In contrast, the indigenous groups claiming for communal land rights in Salta had a limited political leverage when dealing with the provincial political institutions, although they had support from national and international NGOs and the Anglican Church. Meanwhile, in the case of the social actors protesting against CEAMSE's policy in Punta Lara, their political leverage at the provincial level was rather limited, but the social groups showed a high level of mobilization at the local level and were quite able to sustain their advocacy efforts through time, which helped placing the issue in the public agenda. In short, there was some variation in the level of political leverage showed by the social actors involved in each of the policy processes. However, regardless of this variation, all four policy disputes were judicialized, which indicates that the political leverage of the social actors was not a relevant causal factor at least in this political scenario.

Summing up, the judicialization of the public policies examined in this chapter occurred in political contexts that were characterized by the resistance (or even the open opposition) of the executive branch to implement existing policies or to act according to existing regulatory frameworks. Furthermore, the opposition of the government was complemented by a rather passive and deferential legislature, which did not fully exercise its powers and oversight role, allowing the political elites in charge of the executive to interpret and apply existing laws and policies according to their own policy preferences. This combination of a discretionary exercise of executive power and weak legislative control and oversight over the executive, constituted the critical political scenario under which these disputes about public policy issues became judicialized.

CHAPTER 6: LACK OF POLITICAL LEVERAGE AS A SOURCE OF JUDICIALIZATION

This chapter describes and compares three of our cases of judicialization of public policy in Argentina: the re-structuring of the phone tariffs that occurred during the 1990s, the dispute about oil drilling in the Llancanelo wetlands in the province of Mendoza, and the re-negotiation of the Metropolitan train concessions during the Menem administration. It also analyzes, although briefly, the conflict over environmental pollution in the Matanza-Riachuelo basin. Our QCA analysis shows that all these cases shared a basic pattern: the judicialization of these policy issues were triggered by social actors with very low political leverage, unable to modify the existing status quo in certain policy field or to block policy reforms promoted by the governments.

To a large extent, this configuration reflects the political disadvantage argument developed by the literature on legal mobilization, which points out that policy litigation is basically pursued by social groups that have structural difficulties or limitations to access and affect majoritarian or regulatory policy processes (Cortner 1968; Sathe 2002; also Wilson and Rodriguez Cordero 2006). However, a main contribution of our QCA analysis is that it also shows that these groups, although they are politically disadvantaged, they are not necessarily losers of the policy process. In half of the cases covered by this configuration, the involved social groups were basically demanding the implementation or enforcement of policy mandates that were previously approved (for whatever reason) by the legislature or regulatory agencies, and therefore were already part of the existing normative and policy framework. In sum, the distinguishing feature of these policy disputes is that they became judicialized in political scenarios in which the involved social groups had a limited capability to access and be part of policy

negotiations, regardless of whether they lost in the majoritarian policymaking venues or were demanding the proper implementation/enforcement of existing legislation.

As explained in the previous empirical chapters, the purpose of the case studies is twofold. In the first place, a detailed, historical analysis of each of these policy disputes allows for assessing the fsQCA coding on these cases. Second, they allow for examining the internal validity of the causal configurations (the minimal formulas) identified through the QCA analysis. As in the previous chapters, the case studies are organized in two sections. The first part is a historical description of how a particular policy issue evolved and became judicialized. This part emphasizes the chain of events and situations leading to the judicialization of that policy dispute. The second part constitutes a more structured and focused analysis. It only deals with those aspects or features of a case that directly speaks to the conditions that are theoretically relevant for this study. Finally, the chapter concludes with an analysis of the similarities and differences between all the cases examined in the chapter.

Following, I include the fuzzy set coding of the casual conditions for the four cases analyzed in this chapter.

Table 6.1: Fuzzy Membership Scores of Causal Conditions

Cases	*Policy Loser*	*Weak Political Leverage*	*Legislature Passiveness*	*Opposition of Executive*	*Deficient State Capacity*
Re-structuring Phone tariffs	**.67** (1)	**.67**	**.67**	**.67**	**.33**
Oil production Llancanelo	**.33**	**.67**	**.33**	**1**	**.33**
Train service reform	**1**	**.67**	**.33**	**1**	**.33**
Pollution Riachuelo basin	**.33**	**1**	**.67**	**.67**	**1**

(1) In fuzzy set language, 1 means a case has full membership in a set, .67 means that a case is more in than out of a set, .33 means a case is more out than in a set, and 0 means a case is clearly excluded from the set. When these scores are translated into Boolean logic, scores 1 and .67 indicate that, in a given case, a causal condition is relevant or present. On the contrary, scores .33 and 0 indicates that a causal condition is irrelevant or absent.

THE RE-STRUCTURING OF THE PHONE TARIFFS

The re-structuring of the phone tariffs during the Menem administration was one of the most intense and disputed tariffs conflicts resulting from the privatization of public services that occurred in the 1990s. The telecommunication sector was the first major public service to be privatized by the Menem government. ENTEL, the state-owned company that had the monopoly of the telephone services, was privatized in 1990 through an open and public bidding process.[222] To that end, ENTEL was broken down into two units, each one covering roughly half of the country, and the government offered seven years exclusivity to the winning bidder in each region, with the prospect of extending the exclusivity period for three more years if certain investment conditions were satisfied. A consortium led by *Telefónica de España* won the bid for the southern half of the country, which included a large portion of Buenos Aires metropolitan area, while France Telecom was awarded the northern region.

The new phone companies began providing the services based on a similar tariff structure to the one used by ENTEL. Basically, tariffs for local urban calls were relatively low in comparison with long distance and international service rates. Some observers even framed this structure in terms of long distance and international services "subsidizing" local phone services in the large urban areas. Given that Telefónica and Telecom had regional monopolies for local as well as for long distance/international services, this tariff structure was not a main issue at the moment of the privatization. However, few years later, Telecom and Telefónica began facing a very strong

[222] Decree 731/89 established the process for the privatization of ENTEL. The state company was finally privatized in November 1990.

competition in the long distance segment, from companies located abroad which offered call back services at a very low price.

In this context, the re-structuring of the phone tariffs became a main issue of negotiation between the government and the phone companies. By September 1994, the government announced its support for a proposal made by the companies, which basically consisted of an average 15% reduction in long distance tariffs and a general tariff increase in local phone services which could amount to over 60% depending on the area.[223] ADELCO, one of the few consumer associations existing at the time, quickly filed a *recurso de amparo*.[224] The plaintiff argued that the government had first to convoke a public hearing to discuss the tariff reform as established by article 42 of the national constitution.[225] The presiding judge granted a preliminary injunction requested by ADELCO, and stopped the government from moving forward with the tariff reform. In this context, the government decided to organize a public hearing (the first in the privatized telecommunication sector), which was held in December 1994. In the hearing, the re-structuring of the tariffs faced the expected opposition of consumer groups, but also it was largely resisted by the board of the CNT (*Comisión Nacional de Telecomunicaciones*), the agency in charge of controlling the phone companies; and the tariff reform proposal did not advance (Urbiztondo et al. 1998, 384).[226]

---

[223] See brief description of this tariff reform proposal in La Nación ("Vuelve a negociarse la tarifa de teléfonos", October 18, 1996).

[224] In her book, Rhodes (2006, 84-85) states that ADELCO's representatives learned thought the media about the government's agreement with the phone companies. They immediately contacted and requested a meeting with the involved government officials, but their efforts were unsuccessful.

[225] Article 42 of the constitution reformed in 1994 refers to consumer's rights.

[226] The CNT was created by the Menem administration when Entel was privatized in 1990. The first CNT's board was directly appointed by the national government and it was characterized by the low technical and professional capability of its members, which greatly affected the credibility and prestige of the agency (Urbiztondo et al. 1998). In October 1993, the government reformed the commission and carried out an open selection process (which involved competitive examinations) for appointing the new members of the CNT's board. This was the board who opposed the re-structuring of the tariffs.
In relation to the re-structuring of the phone tariffs, although the CNT did not have the final decision power about the issue, its opposition greatly affected the prospect of the companies' proposal in the short term.

However, the Menem administration strongly supported the idea of re-structuring the phone tariffs.[227] In May 1995, few months after the hearing, the Menem administration intervened the CNT and removed its board (decree 702/95). The agency's autonomy was greatly reduced and the policymaking process in relation to the tariffs was further centralized by the government, creating a more favorable environment for the re-structuring negotiations.[228] In parallel, the government hired an international consultant, the National Economic Research Center (NERC), to produce alternative scenarios for re-balancing the phone tariffs. In January 1996, the government organized a public hearing in the city of Buenos Aires, in which four different proposals for tariff restructuring generated by the NERC were presented to the public. The core of the proposals was basically the same: to reduce long distance tariffs, while increasing local services costs. [229] In the hearing, the national ombudsman office and consumer associations manifested their opposition to increasing urban phone tariffs.[230] A few months later, in October 1996, the government requested Telefónica and Telecom to submit their own proposals for restructuring the tariffs. By the end of October, the companies submitted their proposals, which included a 100% increase in local call tariffs during peak times and a 40% reduction in long distance tariffs.[231] The government, then, convoked a new public hearing to discuss the companies' proposal, which took place in the city of Posadas on December 5-11. Several provincial governors and mayors of provincial cities and towns (most of them belonging to the Peronist party) spoke in the hearing in favor of re-

[227] Some members of government, especially the minister of economy Domingo Cavallo, saw in the re-structuring of tariff the possibility to request the phone companies to liberalize the telecommunication market before the dateline established in the original concession. See, for instance, references to a Cavallo's statement about this issue in La Nación ("La apertura telefónica está en camino", February 11, 1997).

[228] The re-structuring negotiations were basically conducted by the Secretary of Communications.

[229] La Nación ("Nuevas tarifas telefónicas, January 30, 1996)

[230] La Nación (No subirán por ahora las tarifas telefónicas", January 31; "Todavía no está cerrado el debate respecto de las tarifas telefónicas" February 1, 1997).

[231] La Nación (" Las telefónicas proponen alzas y subas en sus precios", November 30, 1996)

structuring the phone tariffs; they stressed that the current structure favored the large urban areas, mainly the metropolitan area of Buenos Aires, in detriment of the smaller provincial cities and towns.[232] Similar arguments were made by several provincial business associations, which outlined the higher communication costs facing businesses operating from the provinces. The opposition to the phone companies' proposal was embodied by the national ombudsman office and different consumer associations which basically agreed that inter urban/international phone tariffs needed to be reduced, but stressed that the phone companies had had extraordinary profits since the privatization of the services, and therefore they should face the costs of re-structuring the tariffs, not the consumers. Several national legislators from opposition parties also spoke at the hearing, rejecting the tariff increases.

A month after the hearing, on January 30, 1997, the government issued decree 92/97 modifying the phone tariff structure. Although the tariff changes finally approved by the government varied from the one proposed by the companies, the core structure of the reform was basically the same. Local phone tariffs suffered a mayor increase (between 41-66%) while inter-urban and international phone service costs decreased significantly (for instance, 60% reduction in calls to USA).[233] As expected, there was a strong reaction among those opposed to the phone tariff re-structuring.[234] On February 10, legislators from opposition parties, consumer associations and other social actors called the public to protest against the tariff increases by leaving their phone off the hook for 15 minutes at 12:45 pm. The protest (known as *"el telefonazo"*) was repeated on February 24 and March 3. However, public response and involvement in the protests was

[232] See the Whereas section of decree 92/97, which described the main arguments made by different speakers in the hearing.
[233] La Nación ("Suben los abonos y bajan las tarifas interurbanas", January 31, 1997).
[234] La Nación ("Teléfonos: un aumento inevitable", February 1, 1997; "Crece el rechazo al ajuste de las tarifas de teléfonos, February 4, 1997).

far from massive.[235] At the same time, in congress, opposition parties and even some members of the Peronist party (the party of government) submitted different declaration projects calling the government to review or to suspend the application of the phone tariff increases. However, the Peronist party controlled both houses of congress and did not allow these proposals to advance within the legislature agenda.

Meanwhile, several legal complaints were filed against the government by consumer associations and ombudsman offices in relation to decree 92/97. On February 10, a federal district court in the province of Mendoza granted a *recurso de amparo* submitted by PRODELCO, a local consumer association, and ordered the government to suspend the tariff increases established by decree 92/97 while the legal procedure was pending ("PRODELCO v. Estado nacional s/amparo").[236] The plaintiff basically argued that article 2 of decree 92/97 was unconstitutional because the tariff increases were unreasonable (they benefited the companies in detriment of the large majority of consumers), they had not been submitted to a public hearing (the company's tariff proposal were submitted to a hearing but not the tariff structure approved by the government), and they were violating the conditions under which the phone concessions were granted. A couple of days earlier, a federal district court from the city of Buenos Aires had also granted a *recurso de amparo* submitted by the national ombudsman, and ordered the government to suspend the application of decree 92/97 while the legal procedure was pending ("Defensor del Pueblo de la Nación v. Poder Ejecutivo nacional

[235] Moreover, the companies did not measure the volume of phone calls during the time *"el telefonazo"* was being carried out, so there was no clear public information about the extent of the protest, which arguably further weakened its impact. See La Nación ("Apagón telefónico de 12 a 13 en protesta por el rebalanceo", February 24, 1997). In relation to the apparent low popular involvement in the protest, see La Nación ("Se diluye la oposición al ajuste telefónico", March 4, 1997).

[236] It worth noting that only the tariff increases were suspended (article 2 of the decree); the rest of the decree was still valid (and therefore the reduction in the long distance and international tariffs). Moreover, the tariff increase was only suspended in the province of Mendoza, which was the jurisdiction of the court hearing the case. For a brief description of the judicial resolution see Maurino et al. (2005, 108-109).

(Ministerio de Economía y Servicios Públicos) s/ amparo"). On February 12, another federal court of the city of Buenos Aires granted a provisional remedy requested by two consumer associations ("Consumidores Libres Coop. Ltda. y otro v. Estado nacional - Presidencia de la Nación- y otro s/sumarísimo") , and suspended the application of article 2 of the decree 92/97. All these provisional measures were confirmed by different courts of appeal.

At the same time, social actors supporting the re-structuring of the phone tariffs also submitted different legal motions requesting the courts to maintain decree 92/97. On February 13, a federal district court from the province of Córdoba granted a motion submitted by the Córdoba industrial association requesting the court to declare the legality of decree 92/97 ("Unión Industrial de Córdoba v. estado nacional s/ medida cautelar autónoma"). In April, a federal district court from the province of Chubut granted a similar motion submitted by the Puerto Madryn business association, and ordered the phone companies to implement the tariff changes established by decree 92/97 ("Cámara de Industria, Comercio y Producción de Puerto Madryn v. Estado nacional s/ medida cautelar").[237]

This tangled web of contradictory judicial resolutions created a situation of extreme uncertainty for the phone companies as well as for the consumers regarding what tariffs were legally in place. As result, the issue of the tariff re-structuring soon landed on the Supreme Court's docket. On May 7, 1998, the Court decided the PRODELCO case, overturning the decision of the court of appeals and rejecting the plaintiff's claim.[238] The majority vote (the five justices known as the "Menemist court" because of their close

[237] For a brief legal description of these judicial resolutions, see Maurino et al. (2005, 110-111). Besides these two actions mentioned above, there were several other legal motions requesting the application of decree 92/97.

[238] The Supreme Court also ruled in Defensor del Pueblo v. Poder Ejecutivo Nacional, about the validity of the provisional measure that suspended the application of decree 92/97. As in the PRODELCO case, the Court resolved against the plaintiff and in favor of the national government.

relationship with the Menem administration) basically stated that the executive branch of government has the power to issue the tariffs for the privatized phone services and that the tariff re-structuring was done according to the law. Moreover, they stressed that the legal claim was based upon the plaintiff's disagreement with the content of a policy measure taken by the executive, and it was not the role of the judiciary to assess the opportunity or convenience of a government's decision without affecting the separation of powers. The other four justices sitting on the Supreme Court also rejected the plaintiff's complaint, but did so based on procedural issues and did not address the substantive claims. Although consumer associations and their allies continued opposing the tariff increases, the resolutions of the Supreme Court basically signaled the end of the policy dispute over the re-structuring of the phone tariffs.

Analysis of conditions triggering judicialization

The social opposition to the re-structuring of the phone tariff can be considered a loser of the policy process. The issue went thought different administrative stages until the government finally issued decree 92/97 establishing the new tariff structure. The social actors opposed to the re-structuring basically argued that the reform was mainly benefiting the phone companies in detriment of residential consumers. In other words, they disagreed with the content of the policy promoted and approved by the executive. Moreover, they also argued that in promoting the tariff re-structuring the government was not fulfilling the existing legal framework of the phone services concession, but, this claim was highly contentious and far from clear cut (as the different and contradictory judicial resolutions suggest). On the other hand, even those opposed to the phone tariffs re-structuring acknowledged that the power to regulate the tariffs of public services was in the realm of the executive branch of government. In short, the social opposition to the

phone tariffs reform basically disagreed with the content of the policy promoted by the government. Moreover, these social actors were unsuccessful in their efforts to stop the Menem administration from re-structuring the phone tariffs, which clearly allows for considering them losers of the policy process.

In relation to the political leverage of the social groups opposed to the re-structuring of the phone tariffs, their capability to be part and affect the policy making process was rather limited. As mentioned above, the main opposition was embodied by consumer associations and the national ombudsman office. During the first part of the 1990's, when the issue of the tariff re-structuring began to be discussed, the "organized" consumer movement in Argentina was very incipient and it was just emerging (Rhodes 2006) . With the exception of ADELCO, which was created in the 1980's, most of the consumer associations were created after 1994, when the telecommunication sector was already privatized, and the government was already formulating and negotiating its phone tariff re-structuring policy.[239] For instance, *Unión de Usuarios y Consumidores* and *ADECUA*, two of the most active and well known consumer associations in Argentina, were created in 1994 and in 1995 respectively.[240] Similarly, Lopéz and Felder (1997, 37) report that among the 10 consumers associations legally recognized in Argentina by 1997, most of them were created between 1994 and 1996. Among other things, this clearly affected the timing and the capability of consumer activists to launch coordinated advocacy actions in the face of the government's attempts to modify the phone tariffs. In fact, many of these consumer groups and activists did not even know each before the

[239] Another exception is *Consumidores Libres,* which was created in 1992, before the negotiations about the re-structuring of the phone tariffs became public (http://www.consumidoreslibres.org.ar/home.htm).
[240] See the Unión de *Usuarios y Consumidores's* web site (http://www.usuarios.org.ar/doc.php?doc=1) and *ADECUA's* (http://www.consumidoreslibres.org.ar/home.htm).

issue of the re-structuring of the phone tariffs erupted between the last months of 1996 and the beginning of 1997, when the government modified the tariffs.[241]

In terms of resources, although many of the consumer associations had political contacts (many were created or were initially linked to opposition parties),[242] in general, their organizational support structure was quite weak, with very limited economic and human resources. Their main source of funding (and in most cases the only source of funding) were funds provided by the state as established by the legal regime on consumer protection. For the year 1997, López and Felder (1997, 40) report that the state funding for each registered consumer association was U$10.000 dollar for the entire year.[243] With that level of funding, the consumer NGOs barely covered their basic operation costs, and did not have resources to fund and sustain long term advocacy efforts. Moreover, these associations were new and did not have much social insertion; their memberships were very small and their work (in most cases) was geographically focalized in the metropolitan region of Buenos Aires (López and Felder 1997, 37-40). These factors heavily constrained their capability to reach and mobilize broader constituencies against the government's efforts to re-structure the phone tariffs. In fact, no mobilizations or other type of massive collective actions were carried out when the government was still negotiating the tariff reform with the phone companies. The

[241] For instance, in my interview with Ariel Caplan (a well known consumer law expert and activist in Argentina), he told me that he did not know about PRODELCO until he read in the newspaper that this association had obtained the first favorable judicial decision freezing the application of the phone tariff increases. Similarly, he met for the first time some of the leaders of other consumer groups (for instance, Horacio Berstein, another very active and well known person in the consumer movement in Argentina) at the public hearing organized by the government in Posadas in December 1996. A month later, in January 1997, the government issued the decree modifying the phone tariff structure. (Interview with Ariel Caplan, Buenos Aires, April 8 2008).

[242] For instance, *Consumidores Libres,* was founded by Hector Polino, a legislator of the Argentine socialist party.

[243] ADELCO received a larger amount of funding, apparently because it had several offices located in different parts of the country (López and Felder 1997, 40).

"telefonazo" (and few other collective actions of protest) were organized after the government had issued decree 92/97 and increased the phone tariffs; and even then, the level of public involvement in the protests was rather low.

On the other hand, it can be argued that the social actors opposing the re-structuring of phone tariff did participate in the different public hearings organized by the government. Furthermore, the national media provided ample coverage on the issue, including the views of those opposed to the re-structuring of the tariffs. Arguably, these factors (public hearings, media coverage) allowed the consumer groups and their allies to voice their criticisms about the government's policy regarding the phone tariffs and to place these concerns in the policy agenda. However, this argument - although valid-, does not affect our general assessment about the limited political leverage of the consumer groups. To a certain extent, these instances or windows of access to the policy process (public hearings, media coverage) were a result of the continuous judicialization of the dispute by the consumer groups and the ombudsman. As explained above, the first public hearing convoked by the government to discuss a tariff re-structuring proposal was the result of a consumer group (ADELCO) bringing a legal claim to the judiciary. Until that moment, the policy negotiations between the government and phone companies were basically taking place behind closed doors.[244] Similarly, the media coverage of the re-structuring of the phone tariff increased dramatically in 1997 (in comparison with previous years), after the government approved the new tariff structure and the issue became heavily judicialized.[245] In sum, the political leverage of the social actors opposing

[244] The two other public hearing latter organized by the government should be understood in the light of that precedent. Arguably, the government was not willing to risk further delays of the tariff re-structuring.
[245] For instance, I identified roughly 20 substantive articles about the re-structuring of the phone tariffs published by La Nación during 1996 (the year in which the government convoked the two public hearings, and the companies submitted their proposals for tariff re- structuring). For the year 1997, I identified 63 articles in the same newspaper; three times more media coverage. Although this is a very simple and rough indicator, it does provide a sense of how the level of media attention varied after the government issued decree 92/97 and the dispute was fully judicialized.

the re-structuring of the phone tariff was rather limited; it was not until they started using the courts that they were able to access the policy process and be part of the debate about the phone tariffs.

In relation to the national legislature, the party of government (the Peronist party) easily controlled the Senate and had a near majority in the House of Representatives.[246] This predominance of the party of government clearly shaped the role of congress in the policy process about the re-structuring of the phone tariffs. When the government issued decree 92/97, different bills and resolution projects were submitted in congress calling the government to suspend the tariff increases or to review the measure. The government's policy even triggered some resistance within the Peronist legislative block.[247] Beyond the potential policy reasons for this resistance, 1997 was an election year, and many Peronist legislators were concerned about the potential political costs of the measure.[248] However, the Peronist legislative block quickly realigned with the government, and blocked any legislative involvement in the matter. On March 4th, the House of Representatives held a special session to discuss the re-structuring of the tariffs, but the Peronist legislative block did not provide quorum and the session was cancelled.[249] Similarly, the proposals suspending or reviewing the government measure did not advance within the legislature agenda. In short, a legislative majority aligned with

[246] Between 1989 (when Menem won his first presidential election) and the legislative election of 1997, the Peronist legislative block in the House of Representatives comprised between 45-50% of the 257 seats of the House. During that period, the Peronist party easily reached legislative majorities with the votes of some of the provincial parties or smaller national parties (for instance, UCEDE). Meanwhile, the main opposition parties (UCR and then FREPASO) only had about 35% of the House's seats.

[247] For instance, see projects submitted by legislator Roberto Digon (PJ), and Eduardo Mondino (PJ) requesting the government to suspend the phone tariff increases (files 7633-D-96, 1430-D-97 and 0194-D-97; online data base; Cámara de Diputados de la Nación Argentina).

[248] See La Nación ("Descontento en el PJ con el ajuste telefónico", February 13; and "Se desató una interna en el PJ por la instrumentación del ajuste", February 14, 1997). The midterm legislative election was scheduled for October 1997.

[249] La Nación ("Se frustró la sesión en la cámara baja", March 5, 1997).

the executive blocked any possibility of congress taking a more active role in the policy process and debate about the re-structuring of the phone tariffs.

In contrast, the executive branch of government strongly promoted and supported the re-structuring of the phone tariffs. A good evidence of this support is the intervention of the telecommunication regulatory agency (CNT) decreed by the Menem administration in May 1995 (decree 702/95). As mentioned above, the CNT's board at that time, which had been appointed through a meritocratic procedure, did not fully support the re-structuring of the phone tariffs (Urbiztondo et al. 1998). Therefore, the government intervened the CNT, removed the board entirely, and further centralized the phone tariffs negotiation. During the following year and half, the Menem administration took several other administrative measures aiming to prepare the scenario for the phone tariff reform (it hired an international consultant to produce alternative re-structuring proposals, it called Telecom and Telefonica to submit their own proposals, it organized the public hearings, etc.). Finally, in January 1997, the government issued decree 92/97 and established the new phone tariff structure.

The last factor to consider is state capacity. Our historical analysis of this case suggests that this was not a relevant factor in the development of the policy dispute. In contrast, one could argue that the institutional weakness of the telecommunication regulatory agency (the CNT) left the way open for the Menem administration and the phone companies to advance the negotiation over the re-structuring of the phone tariffs according to their own preferences. However, it is worth remembering that it was the Menem administration which created, designed and reformed the CNT. Thus, the

institutional weaknesses suffered by the regulatory agency were, arguably, a direct result of the policy preferences and choices made by the Menem government.

Summing up, the re-structuring of the phone tariffs was unsuccessfully opposed by consumer groups and others actors. This lead to the judicialization of this policy in a context in which the opposing groups did not have much political leverage during the policy process, the legislature was rather passive and the executive strongly supported and promoted the tariff reform.

THE LLANCANELO WETLANDS

The policy conflict about the Llancanelo Lagoon is a typical example of the problems that can arise between environmental protection and oil production projects. Llancanelo is a wetland ecosystem, located in the southern part of the Mendoza province, closed to the town of Malargue, and covers an area of 65.000 hectares. It is considered one of the most important wetlands of Argentina. In 1996, it was declared a Ramsar site, which implied an international recognition of its unique ecological value.[250] But Llancanelo is also located over vast oil deposits, and in fact, there had been oil operations in the area since 1930.[251] This tense relationship between environmental values and oil production was already present in earlier efforts to regulate the use of this area. In 1980, the provincial military government at the time declared the Llancanelo Lagoon a wildlife reserve, although it allowed oil activities under certain conditions (law decree 9/80).[252] In

[250] The Convention on Wetlands of International Importance (The Ramsar Convention) is an international treaty for the conservation and sustainable use of wetlands. Presently, there are over 150 states parties to the convention.
[251] Although, given the physical-chemical features of the area's oil and its high costs of extraction, oil production in the region was rather intermittent and low scale (Sosa 2005).
[252] The reserve covers approximately 42.000 hectares, formed by the Llancanelo Lagoon and a perimeter of roughly 1 km around it.

1995, 12 year after the return to democracy, the provincial legislature approved law 6.045 of Protected Natural Areas of Mendoza, which included the Llancanelo Wildlife Reserve. The new law banned any type of oil and mining operations in protected areas.[253]

By the end of the 1990s, the oil company Repsol - YPF began to search for oil in the Llancanelo area.[254] The development of the new technology of horizontal drilling raised the possibilities of efficiently producing oil from the region. In August 1999, the provincial government authorized Repsol - YPF to begin the oil exploration activities.[255] The authorization was granted through a fast track administrative procedure, called *"aviso de proyecto"*, which did not require the development of an environmental impact assessment or the organization of public hearings. A year later, on May 2000, Repsol - YPF requested authorization to develop the second stage of the project called *"Plan de Acción II Proyecto 2000"*. The project aimed to drill oil from 8 wells in the Llancanelo area, 2 of which were new and the other 6 were reactivated wells. The provincial government, then, opened an environmental impact assessment procedure and organized a public hearing in August, 2000.

Local environmental NGOs and some scientists began to question the project. There were many criticisms about the poor quality of the EIA reports and the lack of proper information about the potential environmental impacts of the drilling (Sosa 2005). A main issue that began to appear in debate about the project was the exact limits of Llancanelo Lagoon Wildlife Reserve, and whether the proposed oil wells were inside or outside its boundaries (provincial law 6.045 was quite clear and definitive on banning oil activities within natural protected areas).[256] Repsol YPF claimed that the oil wells were

[253] See articles 24 and 25 of provincial law 6.045.
[254] In 1993, REPSOL-YPF had gained a 25 years oil concession from the national government for oil exploration and production in the Llancanelo – Malargue area (decree 1764/93).
[255] Resolution 33/1999 of the *Dirección de Saneamiento y Control Ambiental (DSCA)*.
[256] See for instance, the coverage about the issue in the local newspaper Los Andes ("Califican de ilegal al proyecto de Llancanelo", September 21, 2000; "No nos olvidemos de Llancanelo", October 24, 2001)

outside the limits of the reserve; opponents of the project, on the other hand, argued that there was no conclusive evidence of that. The problem was that more than two decades after the state of Mendoza created the Llancanelo reserve, its biological boundaries had not been defined yet. In 1989, some work was done on marking the northern boundaries of the reserve, but the rest of the reserve's limits were not finished (Ramsar Advisory Mission 2002, subhead 134).[257]

Meanwhile, the provincial government strongly supported the project. At that time, the government of Mendoza was in the hands of the Alianza UCR – Frepaso. [258] In September, 2000, governor Iglesias himself, together with members of his cabinet including the minister of environment, publicly announced the oil drilling project from the shores of the Llancanelo Lagoon, stressing that Repsol – YPF was planning to invest over 200 million dollars, which would represent 37 million dollars of royalty for the Mendoza's state, and 280 jobs for the region. Governor Iglesias is quoted by the local media stressing that *"the government has worked on this with the company"*.[259] In the following weeks, several members of the cabinet also went public, claiming that the project was environmentally friendly and fulfilled local regulations.[260]

However, in March, 2001, the development of the project was altered by a complaint for oil pollution in one of the Repsol YPF water wells in the Llancanelo area. The complaint was made by the department of irrigation, which is the provincial state agency in charge of controlling water use and quality in Mendoza.[261] As result of the

[257] See also Information Sheet on Ramsar Wetlands submitted by the Argentine government in relation to the Llancanello Lagoon (Heber Sosa1995, 9).
[258] The Alianza was a nationwide electoral coalition between the UCR and the center-left Frepaso. In the province of Mendoza, the Alianza was dominated by the UCR. On October 1999, the Alianza won the gubernatorial election.
[259] Own translation; Diario Uno ("El área Llancanelo se abre al petróleo", September 12, 2000).
[260] See coverage in local media, Los Andes (September 25 and 27, 2000) and Diario Uno (September 23, 2000).
[261] In a dry province like Mendoza, the management of water resources represents a very important political and economic asset. In this context, the Department of Irrigation is a relatively powerful

complaint, the EIA procedure for the Repsol-YPF's oil drilling project was suspended. Furthermore, media coverage of the issue began raising broader public attention and concern about the prospects of oil drilling in the Llancanelo area. The *fiscalía de estado* (state attorney's office) also felt compelled to act and opened an investigation around this complaint.[262] Meanwhile, Repsol YPF denied the existence of pollution and the provincial government strongly criticized the department of irrigation, and argued that the agency was making an unjustified complaint. Members of the government, such as the Director of Environmental Control and Cleanup, affirmed that there was no pollution in the water well and that the Department of Irrigation had loosened its standards.[263]Despite its negative reaction to the department of irrigation's complaint, the government finally decided to carry out a technical study to assess if the Llancanelo lagoon had been polluted or not.[264] Arguably, this measure aimed to show that the government was concerned and acting on the matter, although it did not solve the suspension affecting the Repsol YPF project which was a main concern for the government and the oil company as well. However, by June 2002, the government could appoint the new authorities of the department of irrigation. One of the first measures of the newly appointed authorities was to authorize the continuation of the EIA procedure on the Repsol – YPF project, even though the studies about oil pollution in the Llancanelo water well were not finished.

---

bureaucratic agency, who has institutional and financial autonomy. The head of the agency *(Superintendente*) and others officials are appointed by the governor with the approval of the Senate every 5 years. Moreover, the governor and the superintendent's terms of office do not match, so it is possible (like in this case) to have a superintendent appointed by a different administration than the one currently in charge of the government.

[262] According to Mendoza's legislation (law 5965), the *fiscalía* is the provincial ombudsman for environmental issues. Nevertheless, the *fiscalía* was somewhat reluctant to become involved on the issue of oil drilling in the Llancanelo area. In fact, there were 35 previous presentations made by different individuals and NGOs at the *fiscalía* about the potential environmental impact of oil drilling in the Llancanelo area, but no mayor action was taken by the *fiscalía* about them (Sosa 2005).

[263] Diario Los Andes ("Detectan petróleo en el agua en Llancanelo", March 20, 2001).

[264] It is worth pointing out that the study was funded by Repsol – YPF.

Shortly after that, the state attorney office also authorized the continuity of the EIA procedure.

During the time the Repsol YPF project was at a standstill, the Llancanelo wetland was included in the Montreux Record of the Ramsar Convention on Wetlands.[265] In July 2001, The Argentinean government formally requested the inclusion of Llancanelo Lagoon in the Montreux Record (only a state party to the convention can request a site to be included in the Record), and it also requested a Ramsar Advisory Mission to study and offer technical advice relating to the conservation problems or threats facing the Llancanelo wetland. The requests were prepared and fostered by the minister of environment of the government of Mendoza. Opponents to oil drilling in Llancanelo deemed the government's measure as one of "contained risk".[266] Ramsar missions are considered to be very balanced and prudent in their assessments, and they do not tend to openly criticize governments' policies. At the same time, the inclusion of Llancanelo in the Register had a strong symbolic value and signaled the government's commitment to conservation. The Ramsar Mission arrived in Mendoza in late October 2001. Besides exploring the Llancanelo Lagoon, the Mission held meetings with government officials, the oil company, local business, environmental NGOS and others interested parties. In February 2002, the Mission made public its report (Report N 48, Llancanelo Lagoon, Argentina) which concluded that oil activities could be carried out in the Llancanelo region as long as certain environmental and safety measures were taken, including formulating an environmental management plan and defining the biological limits of the reserve.

---

[265] The Montreux Record is a list of endangered and threatened wetlands of international importance. It serves the purpose of "*highlighting those sites where adverse change in ecological character has occurred, is occurring, or is likely to occur, and which are therefore in need of priority conservation attention"* (article 3.1, Resolution VI.1, Guidelines for the operation of the Montreux Record, 1996).

[266] Interview with Eduardo Sosa (Buenos Aires, April 14, 2008).

By the end of 2002, after the department of irrigation and the state attorney office re-authorized the continuation of the EIA, the provincial government speeded up the administrative process to approve the Repsol YPF oil drilling project in the Llancanelo area. Between December 2002 and January 2003, different governmental departments approved the EIA and the project was finally authorized by resolution 190/2003 of the ministry of environment.[267] In the same resolution, the government also created the Llancanelo Environmental Management Unit as suggested by the Ramsar Mission. Among other tasks, the Unit had to cooperate in defining the final boundaries for the Llancanelo Wildlife Reserve (article 7).[268] As expected, local environmental NGOs strongly opposed the government's decision to authorize oil drilling in the region. During those months previous to resolution 190, the local media reflected environmental groups' arguments and warnings about the potential environmental consequences of the project but their opposition did not affect the government's final decision.[269]

Two weeks after the government's authorization of the oil drilling project in Llancanelo, one of the most active local environmental groups, Red Ambiental OIKOS, filed a *recurso de amparo* against the government of Mendoza at a local district court ("Asociación OIKOS Red Ambiental c/ Gobierno de la Provincia de Mendoza p/ Acción de Amparo. Expte. 80.866" 2003). Oikos asked the court to declare resolution 190/03 unconstitutional and to order the government of Mendoza to refrain from authorizing the Repsol YPF project until various national and provincial regulations about the EIA and access to information were fulfilled, and especially, until the geographical limits of the

[267] The government fully authorized 5 of the 8 proposed wells. The other 3 wells were going to be located too close to water courses, and therefore they got a conditional authorization until they were re-localized. This was based on a recommendation of the Ramsar Mission (see article 3, Resolution 190/03).
[268] According to resolution 190/03, the Unit was also responsible for controlling the environmental impact of the oil activities and formulating the environmental management plan for the reserve (article 4.c and h).
[269] See for instance, media coverage in Los Andes ("Protesta de ONG ambientalistas por Llancanelo", December 18, 2002; "La explotación en Llancanelo depende de Fiscalía de Estado", December 27, 2002).

Llancanelo Wildlife Reserve were established, given that the provincial law 6.045 prohibited oil activities within protected areas.[270] Furthermore, Oikos asked for the suspension of the project as a provisional remedy while the legal procedure was pending. In March 2003, the judge granted the provisional remedy to avoid potential environmental damages until the core of the legal dispute was resolved. A few months later, in July 2003, the district court declared resolution 190/03 unconstitutional, and stated that the government's authorization to the Repsol YPF project must be based on the previous demarcation of the boundaries of the protected area. As expected, the government appealed the judicial decision. But first, the provincial Court of Appeals (September 12, 2003), and then, the Supreme Court of Mendoza (March 11, 2005), upheld the core of the district court's decision.

Shortly after the resolution of the Supreme Court, the governor of the province finally received and met for the first time with the local environmental NGOs to discuss the issue of oil drilling in Llancanelo.[271] Almost five years had gone since the beginning of the policy dispute. The government, then, started a process of formal negotiation with the different stakeholders (the oil company, Malargue's local government, etc.) to define the boundaries of the reserve, and in that way, the area in which oil drilling will be allowed. In that context, the government produced a proposal for the reserve's boundaries which was supported by the oil company, the Malargue city council and private landowners in the Llancanelo region, but was rejected by the environmental NGOs because critical ecological areas of the Llancanelo wetland were not included.[272] By the

[270] The plaintiffs argued that the government has *"[given] green light for the project to begin without knowing the boundaries of the Reserve and whether the oil drilling will be inside or outside the Protected Natural Area"* (own translation; subhead 82 of the legal complaint).
[271] Diario Uno ("OIKOS y el gobierno negocian una solución para Llancanelo", March 31, 2005). At that moment, the governor of Mendoza was Julio Cobos, who belonged to the UCR, the same political party of the previous governor Iglesias. Cobos was elected for the period December 2003- December 2007.
[272] Diario Uno ("Plan para volver a extraer petróleo en Llancanelo", November 17, 2005; "A Oikos no le convence el plan oficial para Llancanelo", November 18, 2005).

end of 2006, the government submitted its proposal to the House of Representatives. At that time, the government's party -the UCR- had the largest block in the House and in the Senate, but it did not have a legislative majority and the bill did not gain enough support to be approved.[273] After several months of stalemate, the government, Repsol YPF and Oikos began negotiating again, and this time, they reached an agreement about the boundaries of the Llancanelo Reserve. In September 2007, the government submitted the new bill to the legislature, and by November it was approved by both houses. Provincial law 7.824, finally, defined the limits of the Llancanelo Wildlife Reserve.

Analysis of conditions triggering judicialization

Although the provincial government approved the oil drilling project in the Llancanelo area, the social opposition to the government's policy cannot be considered as a strict "loser" of the policymaking process. Two main reasons justify this assessment. First, the main argument used by the environmental groups against the project was that the government had to define the biological boundaries of the Llancanelo reserve before it could approve the location of any oil drilling well in the area. As explained above, the natural reserve in the Llancanelo wetland was created by the military government in 1980 and latter ratified by law of the provincial legislature in 1995. Clearly, the environmental groups were requesting the government to implement legislation that was already in force at the time Repsol YPF requested the government's authorization for the project. Second, the government itself acknowledged that it had a policy mandate to fulfill regarding the boundaries of the Llancanelo reserve. When the government issued resolution 190/03 approving the Repsol – YPF project, it also created the Llancanelo

[273] Based on the results of the two previous legislative elections (October 2003 and 2005), I calculated the UCR had 21 out of 48 representatives of the House and 18 senators out of 38 members of the Senate.

Environmental Management Unit, and one of the main tasks of the unit was precisely to cooperate in defining the final boundaries for the Llancanelo Wildlife Reserve.[274] In short, the social opposition to the oil project in the Llancanelo wetland were basically requesting the government to implement and enforce policy measures that were already approved through the policy making process.

However, the opposing groups to the oil drilling project had very limited political leverage. As mentioned before, the main opposition was embodied by local environmental NGOs. The organized "environmental movement" in Mendoza was quite small, with rather limited appeal to the broader public, and with very limited human and economic resources. For instance, the annual operative budgets of Oikos Red Ambiental and Fundación Cullunche (perhaps the two most organized environmental associations in Mendoza, and both actively involved in the dispute about Llanacanelo) was just between U$5,000 to U$6,000 dollars jointly.[275] Clearly, this speaks of a very limited capability of the local environmental NGO's to launch a coordinated advocacy campaign aiming to lobby policy makers or to mobilize broader constituencies to protest against the government policy in Llancanelo. Beyond the NGOs, some local scientists were also source of opposition to the project. However, the attitude of the local scientific community as a whole was far from homogeneous (Sosa 2005). While many research and technical institutions such as the Provincial Board of Arqueologist and the Regional

[274] Article 7, Resolution 190/2003.

[275] Data available in CIPPEC's online database *Directorio de ONGS Vinculadas a la Política Pública* (CIPPEC, www.directoriodeongs.org/index.php). The data corresponds to the year 2002 and it was reported by the associations. Fundación Cullunche reported a budget of $2,358 Argentine pesos; OIKOS reported an approximate budget between $10,000 to $15,000 Argentine pesos. Just to provide a local standard for assessing these numbers, the annual budget of FAVIM (a well known NGO in Mendoza, working on human rights issues) was between $100,000 to $250,000 Argentine pesos during the same period (FAVIM's data is also available at the *Directorio de ONGs*). That represents more than 10 times the joint budget of the two environmental groups involved in the Llancanelo dispute.

Research Center of Science and Technology (CRICYT) expressed their concerns about the project or were openly opposed to it,[276] others institutions endorsed the EIA reports, such as the Argentine Institute of Research on Dry Regions (IADIZA) and the Andean Regional Center (INA), and stated that oil production in the Llancanelo region was environmentally feasible if precautionary measures were taken.[277] The lack of a clear and predominantly critical view of the project from within the scientific community further reduced the ability of the NGOs to resist the project, or at least to raise the political cost of the government's policy toward oil drilling in Llancanelo.

Meanwhile, in relation to Mendoza's general public, it is difficult to clearly assert whether public opinion was leading for or against the oil drilling project in Llancanelo. There were no opinion polls carried out (at least that we know of it). Local newspapers did cover the dispute and – as a whole- it was a relatively balanced coverage. The main newspapers in Mendoza had opinion articles and editorials against and in favor of oil drilling in the Llancanelo area.[278] In short, there were no clear indicators of a strong trend in the public opinion. Rather than clear opposition or support, uncertainty might have been the predominant attitude among the broader public of Mendoza.

In the Llancanelo - Malargue region, in contrast, the project raised a clear support.[279] Malargue was the closest town to the proposed oil drilling sites in the

---

[276] These institutions and individuals filed presentations at the state attorney office opposing the oil drilling project in Llancanelo (cited in the subhead B2 of the law complaint filed by OIKOS against the government of Mendoza).

[277] These research institutions are cited in the Whereas of Resolution 190/03 as endorsing the environmental impact assessment of the Repsol – YPF oil project.

[278] See, for instance, the contrasting articles published by Los Andes ("El dilema del Llancanelo, December 14, 2002; "Llancanelo, un tesoro ecológico y petrolero", December 15, 2002).

[279] Oikos's volunteers carried out an informal, "home-made" opinion survey in Malargue, and 80% of the respondents were in favor of the oil drilling project and only 20% were against. They carried out the same survey in the city of Mendoza, and the result were 60% in favor and 40% against the project (in this case, the "survey" was done after the judicialization of the dispute, which generated a lot of media coverage of the issue). Even though, these "surveys" cannot be considered representative, they might indicate – especially in the case of Malargue- a trend in the local public opinion. Data provided by Eduardo Sosa, executive director of OIKOS, (interview with Eduardo Sosa, Buenos Aires, April 14, 2008).

Llancanelo wetlands.[280] Even though there were some general concerns about water pollution and the environmental impact, they were overwhelmed by the town's expectations about the potential economic growth and the promise of much-needed new jobs that were attached to the development of the Repsol YPF project in the region.[281] That support became much more vocal when the oil project was first suspended by order of the district court.[282] In sum, Mendoza's public opinion was not mobilized against oil drilling in the Llancanelo wetlands; in contrast, the local community of Malargue was quite supportive of the project.

In this context of limited possibilities of reaching and mobilizing broader constituencies against the oil project, the local NGOs tried to take advantage of the few institutional channels available for them to influence the policy debate and process. These were venues in which the costs of access -for the NGOs- were very low in terms of human and institutional resources needed to participate. For instance, they voiced their concerns in the only public hearing organized by the government in the context of the EIA procedure –August 2000-. Similarly, they met with the Ramsar Mission to discuss the oil drilling project in Llancanelo, and their opinions were cited in the final report made public by the Mission (Ramsar Advisory Mission 2002, subheads 45 and 117). However, it is highly debatable to what extent these instances of public participation offered a significant way for the NGOs to be involved in the policy process, or were just used by the government as "window dressing" opportunities. In any case, it is clear that the access and leverage of the environmental groups changed dramatically after the dispute become judicialized. In this new scenario, the government could not ignore the

[280] At that time, the Malargue county had a population of over 18.000 inhabitants, about 1.2% of the entire population of the province of Mendoza (Census 2001).
[281] Diario Los Andes ("Llancanelo: analizan la tecnología que usa Repsol en los pozos", November 11, 2001). See also the Ramsar Mission Report (2002, subheads 117 and 188).
[282] Diario Los Andes ("El gobierno apelaría hoy el freno judicial por Llancanelo", March 5, 2003).

local environmental groups as a main actor in the policy process. The final negotiations between the provincial government, the oil company and the environmental groups, which defined the boundaries of the Llancanelo reserve latter approved by the provincial legislature, clearly speaks to the leverage gained by the NGOs as a result of the judicialization of the dispute.

In relation to the provincial legislature, although it was not a main player in the policy process about oil drilling in the Llancanelo region (at least in the first stage), the environmental commission of the legislature did perform some level of oversight over the government's policy in the matter. Between 1999 (when Repsol YPF formally submitted its project for authorization) and February 2003 (when the provincial government finally authorized it through resolution 190/03), both houses of the legislature were roughly divided in three equally large legislative blocks between the Alianza (UCR-Frepaso), the Peronist party and the Democratic Party (a conservative provincial party). Accordingly, the political coalition in charge of the executive branch of government at the time –the Alianza-, did not control the legislative assemblies during this period.[283] In this context, one could suppose that the legislature could have become a main venue for the opposition parties to challenge the government policies on Llancanelo. But this was not the case. The Peronist party (PJ) and the Democratic party (PD) did not take clear positions on the issue of oil drilling in the Llancanelo region. There were only a few individual legislators from the main opposition parties who did assume a critical role about the government's

[283] Based on the 1997 and 1999 electoral results, the provincial legislature during the legislative period December 1999-december 2001was composed in the following way: House of Representative: Democratic Party –PD- 16 members, Alianza-UCR 15 members, Peronist Party –PJ- 14 members, others parties 3. Senate: Alianza-UCR 13 members, PD 13 members, PJ 11 members, others 1. After the 2001 election, the political composition of the legislature, for the period December 2001-December 2003, was not significantly modified: House of Representative: Alianza –UCR 16, PJ 14, PD 13, others 6. Senate: Alianza-UCR 13, PJ 11, PD 11, other 3.

policy on this issue.[284] That was the case, for instance, of Senator Elena Giordano (PJ) and Senator Sebastian Brizuela (PJ), who successively held the position of chair of the environmental commission of the Senate. During the first stage of the dispute (roughly from 1999 to 2001), the environmental commissions of the legislature promoted several resolutions requiring government officials to provide information about the Repsol YPF oil drilling project and the measures envisaged by the government to protect the Llancanelo wetlands.[285] Between October and December 2002, the environmental commission of the Senate hold meetings with different stakeholders to learn about their opinions and critiques about the project.[286] After the passing of resolution 190/03 authorizing the project, the Senate' environmental commission monitored and questioned how the government was organizing the Llancanelo Environment management Unit.[287] In

[284] There were also members of the opposition parties that openly supported the oil drilling project in Llancanelo. That was the case, for instance, of the mayor of Malargue, Celso Jaque (Peronist), who will become governor of Mendoza in 2007. See Mayor Jaque's remarks on Diario Uno ("Jaque, a favor de Llancanelo", December 12, 2002).

[285] For instance, in the session of September 27, 2000 (right after the public hearing organized by the government about the Repsol YPF's EIA) the House of Representatives approved a resolution requesting the minister of environment to inform about the project and its potential environmental impact. The resolution was sponsored by legislator Ahumada and legislator Caceres, both from the Peronist Party, {files 26830 and 26845`, see online database`, \Cámara de Diputados de la provincia de Mendoza, #637}. Few days earlier, the environmental commission of the Senate approved a similar resolution sponsored by Senator Brizuela and others legislators from the Peronist party- {file 40870`, online database`, \Cámara de Senadores de la Provincia de Mendoza, #636}. In March 2001, the environmental commission of the Senate approved a resolution sponsored by senator Herrera (PD) requesting the Department of Irrigation to inform about the potential oil pollution in the Repsol YPF's water well (file 41622, online database, Camára de Senadores de la Provincia de Mendoza). In April 2001, members of the environmental commission of the Senate visited the Llancanelo Reserve and the contaminated water well (see Diario Los Andes, April 20, 2000). On June 26, 2002, the House of Representative approved Resolution 302 sponsored by legislator S. Martin (PJ) requesting the minister of environment to inform whether the ministry agreed with the recommendations issued by the Ramsar Mission, and in that case, what measures were going to be taken to implemented it (file 20625, online database, Cámara de Diputados de la provincia de Mendoza).

[286] The meetings were promoted by the chairman of the commission, senator Brizuela –PJ- {files 44411 and 44878`, online database \Cámara de Senadores de la Provincia de Mendoza, #636}.

[287] For instance, see the brief media coverage of a crisped meeting between members of the Senate commission and government officials regarding the oil drilling in Llancanelo (Diario Uno, "Se extiende litigio por el petróleo", March 7, 2003). Moreover, the Senate's environmental commission also approved a resolution sponsored by senator Brizuela (PJ), which required the government to include a representative

short, although the provincial legislature was not heavily involved during this first stage of the dispute about oil drilling in the Llancanelo region, the environmental commissions of the legislature (especially of the Senate) did exercise some level of oversight of the government's policy on this matter.

The local legislature became a more central venue in the policy process after the Mendoza Supreme Court upheld the lower courts' resolutions and stated that oil drilling in Llancanelo could only be authorized upon the previous delimitation of the biological limits of the reserve. The decision of the executive government to define these limits by law and not by a mere administrative resolution, placed the legislature in the center of the policy making process.

In relation to the provincial government, the executive strongly supported and promoted the oil drilling project in the Llancanelo region. The initial government reaction against the complaint made by the department of irrigation about oil pollution in one of the Repsol YPF water well put in evidence that the government prioritized the development of the oil production in the Llancanelo region over environmental concerns.[288] Similarly, the government's actions and arguments in the policy debate about the location of the oil drilling wells and the boundaries of the natural reserve, clearly favored the development of the oil project in detriment of the preservation of the wetlands.[289]

---

from the local government of Malargue and from an academic institution in the Llanacanelo Environmental Management Unit {file 45119`, online database \Cámara de Senadores de la Provincia de Mendoza, #636}.

[288] As explained in footnote 261, the department of irrigation was an agency of the state with certain levels of autonomy and independence from the political administrations in charge of the executive branch of government.

[289] A brief overview of the courts' proceedings on this issue is enlightened. For instance, in its response to the lawsuit filed by Oikos, the government affirmed that the oil drilling sites were located outside the Llancanelo Wildlife Reserve based on documents and a map produced by Repsol YPF itself. That map, indeed, showed a demarcation layout between the oil production area and the shoreline of the lagoon. However, as the district court pointed out in its resolution ("Asociación OIKOS Red Ambiental c/ Gobierno

The support given by the government to the Llancanelo project can be easily understood if one takes into account the importance of the oil industry, and specifically of the company Repsol YPF, in the economy of Mendoza. Oil was (and still is) one of the main economic activities in the province and a main source of income for the provincial state. In 2002, oil royalties represented 35% of the Mendoza state's fiscal income -about 300 million dollars.[290] In its initial stages, the Llancanelo project was expected to amount to only 1% of the total oil production of Mendoza. However, the oil reserves located in the area were believed to be extremely important, which could generate a substantial increase in the levels of oil production in Mendoza in a near future, and therefore, in the amount of the royalties to be perceived by the state.[291] Furthermore, over 70% of the whole oil production in Mendoza belonged to Repsol YPF, which evidently speaks to the relevance of the company in Mendoza's economy and politics.[292] In short, the importance of oil production for the economy of the province, and especially the relevance of the oil royalties for the state's finances, clearly helps explain the strong support provided by the provincial government to the Repsol YPF project in the Llancanelo wetlands.

---

de la Provincia de Mendoza p/ Acción de Amparo. Expte. 80.866", sub-heading V), that map was not previously submitted to the control and approval of the proper state agencies, including the provincial land registry office. In other words, the government was justifying its policy upon a private measurement done for the company.

290 Diario Los Andes ("Petróleo en Llancanelo", October 17, 2002).

291 Some studies stated that about half of the oil reserves of the province were probably located in the Llancanelo area (Diario Uno, "Repsol – YPF invertirá U$7 millones en Llancanelo", December 13, 2002; Diario Los Andes, "En 30 días comenzaría la explotación de Llancanelo", December 13, 2002)

292 A concrete example of this relevance is the role played by the Repsol YPF in the surrender of the Aconcagua provincial bonds. During the second half of 2002, the state of Mendoza was at the edge of default. The provincial Aconcagua bond was due in early October of that year and the government could not ensure funds from *Banco Nación* to service the debt in term. Few days before the maturity of the bonds, Repsol YPF agreed to make an advance payment of oil royalties, allowing the provincial government to pay off the bonds and avoiding the financial default. Opponents to oil drilling in Llancanelo suggested that the Repsol YPF lobbied the provincial government to speed the authorization of the Llancanelo project as part of agreement to advance the payment of the oil royalties (Sosa, 2005). Regardless of whether Llancanelo was part of those negotiations or not, the role played by Repsol YPF in the Aconcagua bond tale clearly speaks to the leverage the company had in the provincial economy and, arguably, in the provincial politics.

A last issue to analyze is whether the policy dispute about Llancanelo was related to problems of state capacity. Many different governments went by since the creation of the Llancanelo Wildlife Reserve in 1980 and its legislative confirmation in 1995. However, the biological boundaries of the Reserve were not defined. It is not clear why the delimitation was not done during that time, but the evidence suggests that it was the result of not being a policy priority of the successive governments than to a clear lack of state capacity. In fact, the Mendoza state apparatus had the human resources needed to carry out this task. As mentioned above, the northern part of the Llancanelo Reserve boundaries were marked in 1989, and this work was done by experts that worked or were related to the provincial state apparatus.[293]

Summing up, the oil drilling project in the Llancanelo wetlands was strongly promoted and supported by the provincial government, while the social opposition -although intense- was politically weak. This combination of conditions led to the judicialization of the dispute in a context in which provincial legislature exercised its oversight role over the executive in this matter and state capacity issues were not relevant in the development of the dispute.

THE RE-NEGOTIATION OF THE METROPOLITAN TRAIN CONCESSIONS

Between 1991 and 1995, the national government under the presidency of Carlos Menem privatized the operation of the passenger train services in the metropolitan area of

[293] This is the case, for instance, of the biologist Heber Sosa, who was part of the team of expert that marked the northern biological limits of the Reserve (see citation in the Ramsar Mission Report, subhead 134) and also worked for several years at the Department of Wildlife of Mendoza. Moreover, H. Sosa was also heavily involved in promoting and preparing the documentation for the inclusion of Llancanelo wetland in the Montreaux Report (Interview with Eduardo Sosa, Buenos Aires, April 14, 2008).

Buenos Aires.[294] This policy was part of a broad market reform carried out by the Menem administration during the 1990s, which included the privatization of the entire national railway system as well as most public utility companies owned by the Argentine state. In order to facilitate the privatization of the passenger services, the metropolitan railway system was break up into different segments, and the operation of each segment was granted in concession through a competitive bidding.[295] Most of the concessions were granted for 10 years and were supposed to end between 2004 and 2005. However, in June 1997, only two years after the companies began providing the services, the Menem administration issued decree 543/97, beginning a process of renegotiation of the concessions.

The renegotiation was mainly justified with the argument that there was an increase in the use of the metropolitan passenger trains since the privatization of the services, and the satisfaction of that demand required new investment.[296] Basically, the government was proposing to extend the current concessions for longer periods and to increase tariffs, while the concessionaire companies would make investments not

---

[294] In April 1991, the government issued decree 1143/91 which established the privatization of the metropolitan passenger train services.

[295] During 1991, the national government organized a public bidding for the operation the metropolitan passenger train services. To facilitate the privatization process, the metropolitan network was break up into 7 different segments. In 1993, the government granted the concessions, which – in accordance to the legal framework regulating the bidding- were awarded to the business groups which requested the less amount of government subsidy to provide the services. However, the bidding and award processes suffered serious delays as resulted of various administrative challenges and claims brought by different business groups that participated in the process. Only by May 1995, all the services were transferred to the new operators, and the process of privatization was complete. Below, I listed the companies (underlined) which were awarded the concession of the different segments of the metropolitan passenger train system:
1) Metrovías was awarded the Urquiza branch line and the subway system of the city of Buenos Aires; 2) TBA was awarded the Mitre and Sarmiento branch lines; 3) Ferrovías was awarded the Belgrano Norte branch; 4) Metropolitano was awarded the San Martin, Belgrano Sur and Roca branch lines.
For a more detailed description and analysis of the privatization of the metropolitan railway system see Felder (2001), also Azpiazu (2002).

[296] According to a report produced by the Comptroller General of the Nation (*Auditoria General de la Nación*), the assessment of the passenger train service that triggered the re-negotiation process was based on a research carried out by a private consultant company, Parson Brinckerhoff International S.A, hired by the concessionaire TBA (Auditoria General de la Nación 2002, 3).

required in the original contracts. By April 1998, the government and the concessionaire TBA signed the first agreement (addendum) modifying one of the original concession contracts.[297] The negotiation with TBA was the leading case for the government's policy in this matter, and the agreement was broadly considered as the model to follow in the negotiation with the other concessionaries. As part of this agreement, the TBA concession would be extended until 2025 (originally, it was going to end in 2005), the tariff would be gradually increased as much as 80% in a term of 5 years, while the company would carry out a modernization plan for over 2,200 million US dollars to improve the service's infrastructure. The modernization plan would be funded by the tariff increases, and TBA could only implement the increases insofar as the works established in the addendum were being completed. For instance, TBA could only charged the first tariff increase after it had refurbished 8 train stations and incorporated 33 new passenger wagons.[298]

Up to that moment, the renegotiations between the government and the concessionaries had largely occurred behind closed doors, and were not object of much attention by the media. However, some consumer groups and legislators from opposition parties began alerting that the new agreement was not just a modification to the existing contract, but rather it constituted an entirely new concession, and as such it should be object of a new, open and public bidding.[299] Furthermore, consumer groups and the

---

[297] The government used the term addenda as a way to stress that the new agreements with the concessionaries did not constitute new contracts but just additions to the existing ones.

[298] La Nación ("Se renegoció un contrato ferroviario", April 17, 1998). Also, see the TBA's web site (www.tbanet.com.ar/empresa/historia-print.asp).

[299] See, for instance, the statement made by Héctor Polino (a socialist legislator and also president of the consumer group *Asociación Consumidores Libres)* in relation to the agreement between the government and TBA (own translation from Spanish): *"...a new bidding should be called, because [the agreement] is modifying the tariffs, the investments and the deadline of the original contract; it is a new contract…"* (La Nación "Se renegoció un contrato ferroviario", April 17, 1998). See also La Nación ("Presión empresarial para que aumenten los trenes", April 9, 1998).

national ombudsman office objected that the negotiations were taking place without any input and involvement of the trains' users.[300]

In October 1998, the congressional bicameral commission in charge of monitoring the privatization process *(Comisión Bicameral de Seguimiento de las Privatizaciones y Reforma del Estado)* began discussing the TBA's addendum.[301] The commission was constituted by 6 members from the government's party (the Peronist party) and 6 members from different opposition parties (3 from the UCR, 1 Frepaso and 2 from provincial parties). Initially, the Peronist legislative block in the commission was unable to get the 7th vote needed to approve the TBA's addendum.[302] The main opposition parties, the UCR and FREPASO, were increasingly critical of the privatization processes carried out during the Menem administration. Furthermore, the presidential election was coming the following year (October 1999), and the quality and costs of privatized public services were already a main issue in the opposition parties' electoral campaign. In this context, the negotiations within the commission were stalemated for the following couple of months, but by December 1998, the Peronist block was able to get a

---

300 See, for instance, the statements made by the national ombudsman, Jorge Maiorano reproduced by La Nación (own translation, November 6, 1997): *"...the contracts are being renegotiated without taking into account the rights of the consumers...the 1994 constitution provided for consumer rights, but we are living like we were in 1990...I advised the secretary of transport Armando Canosa to convene a public hearing to define the trains and subway tariff increases, but Canosa told me that it would politicize the issue, and I answered him that in that case, I won't have other option but to bring a claim to the courts..."*

301 This congressional bicameral commission was established by article 14 of law 23.696, also known as the State Reform Law. This law was approved by congress on August 1989, at beginning of the Menem administration, and among other things, it authorized the government to privatize the state companies. According to the law, the bicameral commission was in charge of monitoring the process of privatization, and it had the power to issue non-binding reports (*dictámenes*) approving or not the different privatization agreements and negotiations made by the executive.

302 La Nación ("Debate el Congreso el aumento ferroviario", October 28, 1998; "Trenes por decreto", November 5, 1998).

majority within the bicameral commission and the TBA agreement was finally approved.[303]

After the legislative commission's ratification, the government was ready to legalize the modification to the TBA's concession. The company had been already making investments and carrying out the works agreed with the government, which suggests that TBA perceived the approval of the concession's addendum as a certain and imminent outcome. In fact, by January 1999, the company formally inaugurated the eight refurbished train stations required by the agreement as a condition to start charging the tariff increases to the train users.[304] However, the *Unión de Usuarios y Consumidores*, one of the most active consumer associations in this issue, filed a legal claim against the national government at a federal district court ("Unión de Usuarios y Consumidores c/ Secretaria de Transporte y Otros (juicio sumarisimo)"), arguing that the public did not get the chance to participate in the re-negotiation process of the trains' concessions as it is required by the constitution reformed in 1994.[305] Thus, the plaintiffs requested the participation of the consumers in that process and asked the court to suspend the renegotiation as a provisional remedy until the case was decided.[306] In its response, the government basically argued that the public had been involved in the renegotiation process through different opinion polls that were carried out among trains' users, and that

[303] A legislator from one of the provincial parties voted along with the Peronist block in the commission to approve the TBA's addendum. For a media coverage of the work of the commission during that time, see La Nación ("Nuevas tarifas de trenes en febrero", December 17, 1998).

[304] La Nación ("El boleto de tren subirá en febrero", January 22, 1999; "Aumenta el boleto de tren. Aplicación de la suba", March 19, 1999).

[305] The claim was mainly based upon article 42 of the constitution that refers to consumer rights.

[306] During the previous months, the national ombudsman had also filed a legal claim against the government requesting the government to hold a public hearing, but it was rejected by the intervening court ("Defensoria del Pueblo de la Nación c/ Estado Nacional. Amparo (expte. 17521/98)") According to some observers, the problem with the ombudsman's legal claim was that it specifically requested a public hearing, and there were no enough legal basis for such specific request. The Union of Usuarios and Consumidores, instead, argued that the lack of consumer participation in the renegotiation process violated the constitution, and made a more broader request for public participation in the policy making process (interview with Horacio Bersten, Buenos Aires, August 14, 2008).

the polls indicated that the public largely supported tariff increases if they resulted in better services. In February 1999, the judge ruled in favor of the plaintiffs in relation to the provisional remedy and ordered the government not to sign the renegotiated contracts while the case was pending.[307] The government appealed the provisional remedy but the suspension was ratified by the court of appeal.[308] In this context, the government quickly decided to convene a public hearing on the addendum to the TBA contract. The government's measure successfully preempted the judicial procedure. In fact, in the face of the government's decision to organize a public hearing, the *Union of Usuarios* relinquished its legal complaint.[309]

The public hearing took place on March 15, and one day after the hearing, the government issued decree 210/99 approving the addendum to the TBA's concession.[310] This triggered a strong reaction among consumer associations and other actors opposing the tariff increases. They claimed that the public hearing was just a façade; that none of their comments and observations about the contract expressed in the hearing, were taken into account. Moreover, the fact that the decree approving the addendum was issued the

---

[307] *Juzgado Federal de 1ra. Instancia en lo contencioso administrativo*, judge Liliana Heiland.

[308] The court of appeal (*Cámara Nacional Contencioso Administrativa, sala 4*) stated that opinion polls were not sufficient to fulfill the constitutional mandate because they do not allow the public to revise and to control the documentation (in this case, the modified contracts); moreover, they do not allow the public to offer alternative evidence and arguments to the government's proposal. For a brief legal overview of the court of appeal's resolution, see Maurino et al. (2005, 384).

[309] The secretary of transport (the government agency in charge of the renegotiation of the trains' contracts) contacted the *Union de Usuarios* and informed them that the government was going to organize a public hearing to discuss the train's renegotiations. After an internal discussion about how to proceed, the *Union* decided to drop the judicial claim (interview with Horacio Bersten, Buenos Aires, August 14, 2008). On February 26, 1999, the *Union of Usuarios* and the secretary of transport signed a judicial agreement by which the consumer association dropped its legal claim for lack of consumer participation and the government committed itself to organize a public hearing (La Nación, "La semana que paso", February 28, 1999).

[310] The government signed the decree on March 16 (the day after the hearing), and the decree was published in the *Boletín Oficial* on March 17, 1999.

next day after the hearing, it was largely considered as an evidence that the measure was ready even before the hearing took place and that the meeting was a mere formality.[311]

Decree 210/99 triggered a new wave of legal actions. In the following weeks, the national ombudsman office ("Defensor del Pueblo de La Nación c/ Estado Nacional y otros (expte. 9845/99)") and a group of consumer associations ("Consumidores Libres y Otros c/ Estado Nacional –MOSP – Dto 210 s/Proceso de Conocimiento (Expte 9610/99)") filed legal actions against the national government requesting the courts to declare decree 210/99 null and void.[312] Basically, they argued that the addendum did not constitute a mere modification of the existing contract but rather an entirely new concession, and as such it should be object of new, open and public bidding. Furthermore, they request the suspension of decree 210/99 while the judicial procedures were pending. In both cases, the district courts granted the provisional measures requested by the plaintiffs and temporarily suspended the application of the addendum to the TBA's concession contract, and therefore it suspend the tariff's increases. As expected, TBA and the national government quickly appealed these court's resolutions, but they were only able to overturn the provisional measures by the end of January 2000.[313]

---

[311] Interviews with Hector Polino (Buenos Aires, June 9, 2008) and Horacio Bersten (Buenos Aires, August 14, 2008). For a more detailed description of the development of the hearing, and opinions of different actors after the government issued the decree approving the addendum see Clarín ("Cuestionan los aumentos de tarifas para los trenes urbanos", March 16, 1999); also La Nación ("Intolerancia e insultos en debate sobre trenes", March 16, 1999; "Duras imputaciones", March 19, 1999).

[312] Both complaints were filed at federal district courts. In the case of the consumer associations, their claim was filed at the *juzgado nacional de 1ra. instancia en lo contencioso administrativo federal* Nro. 4, judge Osvaldo Guglielmino In its tem, the national ombudsman's claim was filed at the *juzgado nacional de 1ra. instancia contencioso administrativo* Nro. 11, judge María José Sarmiento.

[313] On September 8, 1999, a federal courts of appeals (*Cámara Federal en lo Contencioso Administrativo, Sala V*) revoked the provisional measure granted by the district court in the case Defensor del Pueblo c/ Estado Nacional (Expte. 9845/99). However, decree 210/99 could not be applied yet, because the district court resolution on Consumidores Libres c/ Estado Nacional (Expte. 9610/99) was still valid (annual report, Defensor del Pueblo de La Nación 1999, 267). This resolution was only revoked by the end of January 2000 (See La Nación, "Breves. Trenes en la justicia" February 3, 2000).

In parallel to the judicial procedures regarding the TBA contract, the re-negotiations between the government and the other concessionaries kept advancing. In April 1999, the bicameral legislative commission approved the changes to the Metrovias concession (the company in charge of the Urquiza branch line and the subway system of the city of Buenos Aires) and the government formally legalized the changes by decree 393/99.[314] In October 1999, the bicameral legislative commission approved the reforms to the Ferrovías's concession (the company in charge of the Belgrano Norte branch), and in the following month, it approved the addendum to the Metropolitano's concession (the concessionaire in charge of the San Martin, Belgrano Sur and Roca branches). On December 2 1999, a few days before the end of the Menem administration's term, the government issued the decrees granting the modified concessions to Metropolitano and Ferrovías, which included up to 80% gradual tariffs' increases and a 20 years extension of the concessions.[315] As expected, there was a strong reaction against these last minute decisions of the Menem administration among consumer groups but also among the new incoming government of the Alianza,[316] and even some sectors of the Peronist party.[317]

By the end of December 1999, President Fernando de La Rua took office. The new administration quickly announced that the train contracts modified by Menem would

---

[314] In contrast to the other renegotiations, the changes to the Metrovias concession were unanimously approved by the bilateral commission, and did not raise such strong opposition among the consumer associations. This can be explained by the fact that some of changes introduced in the Metrovias concession were different from the changes introduced in the other train concessions. First, the time of the concession was extended for only 4 years (until 2017), instead of 20 years as in the other contracts. Moreover, the Metrovías tariffs would increase between 50-60% against 80% average in the other concessions. However, all the modified concessions shared a main feature: the companies' investments in infrastructure were going to be cover by the consumers. See Clarín ("Autorizan un aumento del 20% en los subtes", April 24, 1999) also a La Nación's article comparing the changes in the different train concessions ("Mantiene la Alianza posiciones ambiguas en las renegociaciones", November 12, 1999).

[315] Decrees 1416/99, 1418/99 and 1419/99.

[316] The electoral coalition formed by the UCR and FREPASO (the *"Alianza"*) defeated the Peronist party in the presidential election of October 1999, and Fernando de la Rua (UCR) was elected president.

[317] La Nación ("Carga pesada contra los trenes", November 3, 1999); Clarín ("Generalizado rechazo al aumento en los trenes", November 3, 1999).

be revised.[318] The new government, then, made an agreement with the train concessionaries by which the contract reforms (and therefore the tariff increases) approved by the Menem administration were temporally suspended, and a new round of negotiations between government and concessionaries was opened.[319]

Analysis of conditions triggering judicialization

The social opposition to the train tariffs increases can be considered a loser of the policy process. The government negotiated changes in the train concession contracts with the concessionaries, those changes or addenda were ratified by the bicameral legislative commission, and finally the government issued the decrees formally incorporating the changes to the existing concessions despite the opposition of consumer groups and other actors. One could argue that the opposing groups were demanding the effective implementation of existing legislation that affect how the renegotiation of the train concessions should be conducted. That might be the case in relation to the claim for consumer participation (basically, the requirement to convene a public hearing and to provide information to the public), which by that time, it was a relatively standard practice in administrative procedures dealing with privatized state companies, backed up by a bulk of regulatory norms and administrative law and constitutional jurisprudence. But as mentioned above, the government quickly preempted the legal claim for lack of public participation by convoking a public hearing on the addendum to the TBA

[318] Clarín ("Gallo: se revisarán los aumentos en los boletos de los trenes", December 16,1999 "Trenes: comenzó la revisión de los últimos contratos", December 23, 1999).

[319] At the end, the outcome of this new round of negotiations between the de La Rua's administration and the train concessionaries was not substantially different from that of the Menem government. During 2001, in the context of a broad set of measures aiming to reduce the state's spending and deficit, the government of the Alianza issued a decree of necessity and urgency modifying the train concession and raising tariffs. However, by the end of 2001, president Fernando de La Rua resigned and the new government declared the train system in emergency and the tariffs were frozen.

concession. Once this procedural requirement was formally fulfilled, the government firmly continued its policy aiming to modify the train concessions.

In relation to the political leverage of the social actors opposing the tariffs increases, they were not fully able to be part of the policy process and their ability to influence the policy negotiations was rather limited. This assessment is based on two main reasons. First, the consumer groups did not have access to the negotiation process between the government and the concessionaries. In fact, they did not even have access to the information needed to be part of the policy debate. The consumer groups were only able to get a copy of the text of TBA's addendum (the first concession to be renegotiated) when the modified contract was sent by the government to the bicameral legislative commission.[320] In its turn, the public hearing organized by the government about the TBA addendum was –arguably- a façade. By the time the hearing was carried out, the government had already closed the agreement with the company, and the open meeting with the public became just a formality. In this context, it is worth noting that the judicialization of the dispute forced the government and the concessionaires to acknowledge the consumer associations as a party in the policy process. In fact, during the months the TBA's addendum was judicially suspended, the government and the company attempted to reach a negotiated agreement with the plaintiffs.[321] Probably, this was one of few instances in which the consumer groups and its allies were significantly involved in the negotiation process of the train concessions.

---

320 Interview with Horacio Bersten (Buenos Aires, August 14, 2008); see also Clarin ("La Justicia frenó la aplicación del aumento en los trenes", February 4, 1999).

321 There were several informal meetings between the different parties during the time decree 210/99 was judicially suspended. See, for instance, La Nación ("TBA intenta destrabar el conflicto con la justicia", June 25, 1999), also interview with Hector Polino (Buenos Aires, June 9, 2008). Furthermore, in August 1999, Judge Guglielmino formally convened a settlement hearing (*audiencia de conciliación*) between the parties. However, after several hours of deliberation, the parties did not reach an agreement (Clarín, "Rechazo al aumento en trenes", August 13, 1999).

Second, as already explained in the case of the phone re-structuring, the organizational support structure of the consumer movement in Argentina was very weak. The consumer associations had very limited financial and human resources, and were not able to fund and sustain policy advocacy campaigns.[322] One of the main consequences of this organizational weakness is that the consumer groups were unable to reach and mobilize the broader public against the government's attempt to modify the train concessions and raise tariffs. There were not social mobilizations or other forms of massive collective actions aiming to influence the government policy on this matter. Furthermore, it can be reasonably argued that the renegotiations of the train concessions and the potential tariff increases were largely unknown to the broader public. The issue did not gain significant coverage in the national media until the government already announced the negotiated agreement with TBA. In sum, the consumer associations did not have access to the negotiation process, and the broad population of consumers of the metropolitan train services was not organized and mobilized against the government policy aiming to modify the concessions and increase tariffs.

In relation to the legislative power, although the national congress was not a main actor in the re-negotiations of the train concession, it played a role in the policy process through the bicameral legislative commission in charge of monitoring the privatizations. As explained above, this congressional commission was created by law 23.696, also known as the state reform law. Among other functions, the commission has the power to

[322] For instance, in one of my interviews with a representative of a consumer association, I was told that the association did not closely follow up the train tariff dispute after 1989 because, among other factors, the person working on that issue (and many others) had serious family problems and limited the amount time he committed to the association (anonymous interview, Buenos Aires, 2008). As this anecdote suggests, the involvement of these associations in certain policy issues, many times depended on the work and efforts of individual activists, which clearly speaks of the organizational weakness facing this NGOs to launch and sustain advocacy campaign aiming to influence policy process.

issue reports (*dictámenes*) approving or not the different privatization agreements and negotiations made by the executive. Although the reports were not legally binding, they had a strong political value and were basically deemed to provide legal certainty to the private investors that the privatization agreements would be fulfilled. The commission was constituted by 12 members (6 deputies and 6 senators) that were elected by their own chambers. During 1998 and 1999, when the addenda to the train concessions were discussed by the bicameral commission, the Peronist party (the governing party) controlled the Senate and had the largest legislative block in the House of Deputies (around 46% of the seats of the house). As expected, the bicameral commission to some extent reflected the composition of congress: the Peronist party held six seats in the commission, while the other six seats were distributed among different opposition parties (3 UCR, 1 Frepaso and 2 provincial parties). When the re-negotiation of the metropolitan train concessions were discussed in the commission, the addenda to the TBA (the government's leading case), Metropolitano and Ferrovias concessions were approved by just seven votes after disputed processes of negotiation between the different legislative blocks and even within the Peronist legislators.[323]In its turn, the addendum to the Metrovias concession was approved unanimously by the bicameral commission, with the support of the Peronist and the opposition legislators.[324] In sum, although the national

[323] For instance, in the case of the Metropolitano's concession, governor Duhalde from the province of Buenos Aires and the powerful local Peronist party were against the changes negotiated by the national government. In fact, the provincial government requested to be part in the negotiations with the concessionaire. When the bicameral commission discussed the Metropolitano addendum, one of the Peronist member of the commission (deputy Echague, politically close to governor Duhalde) announced that he will not approved the modified concession. After a quite unclear procedure, Echague was replaced by Salto, another Peronist deputy, and the Metropolitano contract was finally approved by the bilateral legislative commission. For a more detailed description of this case, see La Nación ("Duhalde cuestiona la prórroga de la concesión de trenes", November 2; "Divide al PJ la suba en los trenes", November 4, 1999) and Clarín (" Maniobra del PJ en el Congreso para aumentar el boleto de tren", November 4, 1999).

[324] As mentioned above, the unanimity in this case can be explained by the fact that the changes introduced in the Metrovias concession were, to a certain extent, different from the changes introduced in the other concessions (shorter time extension of the concession; lower tariff increases), although the investments in

congress might not have been a leading actor in the policy debate, it was clearly involved in the policymaking process.

In relation to the executive branch of government, the Menem administration strongly promoted and supported the policy of renegotiating the passenger trains concessions. As described above, in 1997 the government issued decree 543/97 and began the negotiations with the concessionaries; then it advocated for the agreements made with the train companies at the bilateral legislative commission; finally, it issued the decrees modifying the concessions. In other words, the executive was a main force promoting the renegotiations of the train concessions. In contrast, state capacity issues were not relevant in the development of this policy conflict. Although state budget deficit problems might help explaining some of the government's policy choices (for instance, no government's funds to cover infrastructure investments), the re-negotiation of the train concessions was not mainly triggered by deficit reduction concerns, and the way the re-negotiations were conducted and developed were not significantly shaped or affected by state capacity issues.

Summing up, the re-negotiation of the metropolitan train services was strongly supported by the national government, and was unsuccessfully opposed by consumer groups who had had limited access to the policy process and limited political leverage. This combination led to the judicialization of this policy in a context in which congress was involved in the policy process through the bilateral legislative commission, which approved the government's policy.

---

infrastructure at the end were going to be covered by the consumers as in the other concessions. See above, footnote 314.

A BRIEF ANALYSIS OF THE MATANZA-RIACHUELO BASIN CASE

Note: given that the chapter has already a considerable length, I do not develop a detailed, historical case study of this dispute, but a rather brief summary, focusing on the political conditions under which this policy conflict evolved.

The Matanza – Riachuelo basin is considered one of the most (if not the most) polluted areas in Argentina.[325] Most of the basin is located in the metropolitan area of Buenos Aires, encompassing part of the territories of the city of Buenos Aires and 14 municipal districts of the province of Buenos Aires.[326] A large percentage of the population of this densely populated region (especially the population living at the banks of the rivers) is poor, lacks access to sewage and water services systems, and lives in slums in extremely precarious housing. Moreover, the basin also includes some of the most heavily industrialized areas in the country, which dump their effluents to the basin's watercourses.[327]

Since the 1990s, there had been some governmental initiatives aiming to clean up the basin and to tackle different environmental problems affecting the region. In 1993, the national government, at that time under the administration of President Menem, created an executive committee (*Comité Ejecutor Matanza Riachuelo*) to carry out an environmental management plan for the basin (decree 1093/93). The secretary of environment at the time, María Julia Alsogaray, made a famous announcement that the Riachuelo would be clean in 1000 days. By September 1995, the 1000 days were over

[325] In fact, according to the Blacksmith Institute, the Riachuelo basin is one of the 30 most polluted sites or areas in the world. See http://www.blacksmithinstitute.org/wwpp2007/finalReport2007.pdf, cited by Napoli and García Espil (2010, 177).

[326] For a brief but detailed overview of the geography, history, social economic features and main environmental problems of the Matanza – Riachuelo basin see the report prepared by Fundación Ciudad (2002); also, see Nápoli (2009).

[327] According to the national government, up to December 2008, there were 4100 registered industries dumping their waste in the Matanza - Riachuelo (data provided by ACUMAR, cited by Nápoli and Espil 2010, 178).

and plan did not advance. The Menem administration, then, created a new executive committee (*Comité Ejecutor del Plan de Gestión Ambiental y de Manejo de la Cuenca Hídrica Matanza Riachuelo -CERM-*), which this time included not only the city of Buenos Aires but also the government of the province of Buenos Aires (decree 482/95).[328] In 1998, the Inter-American Development Bank approved a U$ 250 million loan to Argentina to partially fund the implementation of the environmental management plan for the basin (loan 1059/OC-AR).[329] However, only a very small part of the loan's funds were executed by the successive Argentine governments.[330]Some tasks were carried out, like cleaning of the surface of the river (removal of old ships, etc.) and some flood control works, but there were no major advances in pollution control or significant improvements in the overall environmental quality of the basin.

In parallel to these specific policy measures targeting the basin, during these years general environmental legislation was passed at the federal level, province of Buenos Aires and city of Buenos Aires, which provided legal tools to control the pollution affecting the basin. However, the shared view among experts, activists and local residents is that the level of enforcement of the pollution control regulations in the basin had been extremely low and insufficient (Fundación Ciudad 2002; Defensor del Pueblo de La Nación 2003). For many observers, a main difficulty faced by all these policy efforts is that the exercise of state power in the basin is highly fragmented. Different agencies

---

[328] For a more detailed description of these policy initiatives as well as the institutional design and legal powers of these two committees, see the report prepared by the national ombudsman office (Defensor del Pueblo de La Nación 2003).

[329]For a description of the terms of the loan, see the reports prepared by the national ombudsman office (Defensor del Pueblo de La Nación 2003) and the federal general auditing office (Auditoria General de la Nación 2006).

[330] Only 7.7 million dollars (out of 250 million which constituted the total loan) were executed in Riachuelo related works (Auditoria General de la Nación 2006, 16). During the 2002 economic crisis, and given that the funds were not executed, the IADB and the Argentina government (at this time under the administration of President Duhalde) agreed to use parts of the loan remaining funds to cover urgent social programs.

belonging to the national government, the government of the city of Buenos Aires and the province of Buenos Aires, plus the local governments, have legal competences over diverse issues and parts of the territory of the basin without sufficient inter and intra-jurisdictional coordination. In this complex institutional scenario, jurisdictional problems are extremely common, making more difficult the implementation of policies and programs as well as the enforcement of existing legislation (Defensor del Pueblo de La Nación 2003).

In this context, the legislatures of the main governments involved (the national government, the province of Buenos Aires and the city of Buenos Aires) had been generally passive and clearly deferential to the executives on the policies towards the Matanza Riachuelo basin. Beyond individuals and sporadic initiatives, there were no serious legislative attempts to address the problems of the basin nor to oversee the executives' implementation of the existing programs.

Meanwhile, although social awareness and concerns about the environmental problems in the Riachuelo had been growing throughout the years, collective action had been very fragmented. Social protests and mobilizations had tended to be reactive and focalized, for instance, after specific events of pollution or flood affecting specific areas of the basin.[331] Moreover, after some time, broad popular attention and mobilization usually languished, leaving only a small number of local residents or associations working on and following up the issues. Furthermore, collective actions and demands had tended to be territorially focused (addressing a particular environmental emergency

[331] Such was the case, for instance, of a toxic "cloud" that affected several elementary schools in the Dock Sur during October – November 2001, and triggered strong protest among local residents. This incident and the social protest that followed it, led (among other policy measures) to the creation of a environmental control committee in the Dock Sur, with the participation of the factories, governments and local NGOs. The committed was active during 2002, but by 2003, it lapsed. Some local associations continued their advocacy work on the issue, but the level of social attention and broad mobilization was significantly lower. For a more detailed description and analysis of this process see Lanzetta and Spósito (2003) and Ryan (2004).

affecting certain neighborhoods), and there had been low levels of articulation among local associations and neighbor groups mobilized around these issues in different parts of the basin.[332] In short, the lack of a coordinated and sustained collective demand over the socio-environmental problems affecting the Riachuelo greatly limited the political leverage of the local groups demanding policy changes on this issue.

In this context, by the end of 2002, the national ombudsman's office formed a working group with a few well known NGOs and other institutions to try to "move up" the issue of the Matanza Riachuelo in the national policy agenda. In August 2003, based on a report elaborated by the working group, the national ombudsman issued a resolution declaring the Matanza – Riachuelo basin in state of health and environmental emergency, and requesting different agencies and ministers of the national government to take measures to address the problem. Despite the media attention triggered by the report, and even though many high level government officials publically acknowledged the problems affecting the basin,[333] the government's response (at that time already under the presidency of Nestor Kirchner) was poor, and no significant policy measures were taken.[334]

In 2004, then, a group of 17 residents from *Villa Inflamable* (a highly polluted slum located in the Dock Sur, in the mouth of the Matanza – Riachuelo) and health workers from a nearby public hospital, filed a legal complaint for environmental damages

---

332 Interviews with Mora Arauz (Buenos Aires, June, 2004), Antonio Brailovsky (Buenos Aires, July 7, 2004), Verónica Odriazola (Buenos Aires, July 14, 2004). These interviews were part of a summer field research I carried on June-August 2004 on experiences of social accountability in the Matanza – Riachuelo basin. For a more detailed analysis of this issue, see my field research report (Ryan 2004), available at http://lanic.utexas.edu/project/etext/llilas/claspo/fieldreports/ryan04.pdf. Also, interview with Andrés Nápoli (Buenos Aires, April 10, 2008).

333 For instance, the sub-secretary of water resources stated in written that the he fully agreed with the report produced by the Ombudsman. Similarly, the chief of national cabinet formally responded to the ombudsman, that the government acknowledged that a specific agency for the basin, as proposed by the ombudsman report, was necessary (Defensor del Pueblo de La Nación 2005).

334 See the follow up report produced by the Ombudsman office and the working group (Defensor del Pueblo de La Nación 2005).

to the Supreme Court of Justice against 44 large polluting business located in the basin and the national government and the governments of the province and the city of Buenos Aires. In June 2006, the Court declared itself competent to hear the claim for collective environmental damage.[335] Moreover, it issued an initial resolution ordering the national government and the governments of the province and the city of Buenos Aires to submit a plan to clean up and to control the environmental pollution in the basin according to national environmental law 25.675 (*ley general del ambiente)*. Furthermore, the Court requested the 44 large polluting businesses to provide information about the environmental impact of their activities and whether they had fulfilled other requirements established by the existing environmental regulations. A few weeks later, the Court granted intervention in the case to the national ombudsman and several of the environmental NGOs as interested third parties (*"terceros interesados"*), who became very active actors in the judicial procedure.

In response to the Court's resolution, the national government submitted a bill to the national congress creating an agency for the Matanza Riachuelo basin, ACUMAR (*Autoridad de Cuenca Matanza Riachuelo*). The bill was quickly treated by congress, and by November 2006, it was already approved by both legislative chambers (law 26.168). In parallel, the Court began a process of hearings with the parties with the purpose of gather information about the situation in the basin and to monitor the parties' compliance with its initial resolution. The process of hearings helped keep the attention of the media, governments and the broader public on the issue.[336] In July 2008, the Court finally issued a final resolution; it ordered the governments to develop a program to repair the environment of the basin and to prevent future environmental damages, and it listed some

[335] Meanwhile, the Court referred the liability claims for personal damages to the lower courts.
[336] For a brief but detailed overview of the four hearings convoked by the Supreme Court, see Nápoli (2009).

components or issues which should be encompassed and addressed by the program.[337] Furthermore, the Court created a monitoring commission (c*uerpo colegiado*) formed by the national ombudsman office and the NGOs who intervened in the cause as third-parties, to follow up the execution of the program.[338] Currently, the ACUMAR is in the process of developing and implementing that program, and the judicial procedures are still open.[339]

CONCLUSIONS

The judicialization of the public policies analyzed in this chapter occurred under a similar configuration of political conditions. In all these policy disputes, the involved social actors had very limited political leverage. In the case of the re-structuring of the phone tariffs, the "organized" consumer movement in Argentina was very incipient and was just emerging when the issue of the tariff re-structuring began to be discussed during the first part of the 1990's. This clearly affected the capability of the consumer activists to develop coordinated advocacy efforts and to reach and mobilize the broad public of phone users against the government's attempt to increase local phone tariffs. Similarly, in the case of the dispute about oil drilling in the Llancanelo wetlands, the main opposition was embodied by local environmental groups, which had a small organizational structure and limited capability to reach and mobilize a broader constituency against the government's policy. In the same manner, the consumer groups opposed to the train tariffs' increases had a very limited access to the process of renegotiation of the train's

[337] The Court did not issue a final resolution regarding the attribution of civil liability for the collective environmental damage already cause. The procedure for these claims is still open.
[338] For more information about the *Cuerpo Colegiado* and its activities, see FARN's web site (http://www.farn.org.ar/riachuelo/cuerpo_colegiado.html).
[339] For a detailed analysis of the process of compliance with the judicial resolution and the implementation of the program by the ACUMAR, see Nápoli and García Espil (2010).

concessions, and did not have the capability to reach and mobilize the broader public of train users to protest against the government's initiative. Meanwhile, in relation to the Matanza Riachuelo, collective demands and actions were fragmented and focalized, usually following specific environmental emergencies affecting particular neighborhoods, and broad social attention and mobilization could not be sustained though time. All this greatly limited the political leverage of those social actors that were actively demanding policy changes in the basin.

An interesting evidence of the political weakness of these different social groups is how their access to the policy negotiations improved after the public policies were judicialized. Llancanelo might be the case in which that improvement can be perceived in a clearer and stronger way. The final negotiations between the provincial government, the oil company and the environmental groups to define the boundaries of the Llancanelo Wildlife Reserve clearly speaks to the leverage gained by the NGOs as a result of the judicialization of the dispute. A similar situation occurred in relation to the dispute about the train tariffs. During the months the TBA's concession reform was judicially suspended, the government and the concessionaire attempted to reach a negotiated agreement with the consumer association that brought the legal claim to the courts. Arguably, this was one of few instances in which the consumer groups and allies were significantly involved in the process of re-negotiation of the train concessions. Likewise, in the case of the re-structuring of the phone tariffs, the different public hearings organized by the government and the ample media coverage to the issue (which clearly allowed consumer groups to voice and place their concerns in the policy agenda) were largely a side-effect of the continuous judicialization of the dispute by the consumer associations and their allies.

A significant characteristic of these political scenarios is that the social groups posing demands on the state were - in some cases - relatively clear losers of the policy processes, while in others they were not. The policy loser status is quite clear in the cases of the re-structuring of the phone tariffs and the re-negotiation of the metropolitan train concessions, in which the involved social groups were opposed to policy reforms championed and finally approved by the governments. In the case of Riachuelo, instead, the involved social groups were asking the government to implement and enforce existing legislation and policies. Likewise, in the case of Llancanelo, although the environmental groups were opposed to the oil drilling policy promoted by the government, one of their main arguments was that the government had to define the biological boundaries of the Llancanelo reserve before it could approve the location of any oil drilling well in the area. Clearly, the environmental groups were requesting the government to implement a legislation that was already in force. Moreover, in both cases, Riachuelo and Llancanelo, the governments had -to a certain extent- acknowledged those policy mandates.

This variation in the policy loser status is relevant for two main reasons. First, it shows that the political leverage of the social groups involved in a policy dispute is clearly autonomous (conceptually and empirically) of whether they are strict losers of the policy process or not. While in the disputes about the train concessions and phone tariffs, the involved social actors lost in the policymaking process and had weak political leverage, in the Llancanelo and Riachuelo cases, the social groups were equally disadvantaged in political terms, but were demanding the implementation of already existing policies. Second, the fact that all these public policies became judicialized regardeless of whether actors were losers of the policy process or not, indicates this is not the key causal condition in this type of political scenarios.

In contrast, the role of the executive branch of government is clearly a relevant condition in this political setting. In all these cases, the political elites in charge of the government intensively supported and promoted the public policies that later became the object of judicial disputes. In the case of the passenger train services for the metropolitan area, the national government was the main force promoting the renegotiations of the concessions. In the case of the phone tariffs, the Menem administration not only issued the decree reforming the tariffs structure, but previously, it took different measures aiming to prepare or facilitate the scenario for the tariff reform. The intervention of the telecommunication regulatory agency (CNT), and the removal of its entire board because of their disagreements regarding the restructuring of the phone's tariffs, is a solid indicator of Menem's support for this policy change. Similarly, the government of Mendoza intensely advocated for the oil drilling project in the Llancanelo region. The government's actions and arguments in the debate about of the location of the oil drilling wells and the boundaries of the natural reserve clearly show how the provincial government favored the development of the oil project in detriment of the preservation of the wetlands. While in these three cases, the involved governments were fervently advocating a policy change, in the case of Riachuelo, the governments were protecting the status quo. As described above, the different levels of governments with jurisdiction over the basin were utterly passive and unresponsive to social demands for cleaning and controlling the environmental pollution in the area.

In relation to the role of the legislature, there are differences among the different policy disputes analyzed in the chapter. In the case of the re-structuring of the phone tariffs, the national congress played a rather passive role in the policy process and debate. The national legislature was easily controlled by the party of government, and those bills or resolution projects opposing the executive's policy preferences, were blocked and

could not advance within the legislature agenda. Likewise, the legislatures were generally passive and deferential to the executives in relation to the policies and problems affecting the Riachuelo basin. On the contrary, in the case of Llancanelo, although the provincial legislative assembly was largely indifferent to the issue of oil drilling in the Llancanelo region, the environmental commissions of the legislature did exercise its oversight powers of the government's policy on this issue. Similarly, in the case of the renegotiation of the train concessions, although congress was not a main venue where this policymaking process evolved, the legislature was involved in the policy process through the bilateral legislative commission, which approved the government's policy in this matter. In short, this variation among the four cases suggests that, in this political scenario, the role of the legislature was not a key condition triggering the judicialization of these policy disputes.

Similarly, with the exception of Riachuelo, the other three case studies show that state capacity issues were not relevant in the development of those policy disputes, and therefore, were not a main condition affecting the judicialization of these policy issues. In the Riachuelo case, however, the fragmentation of the state and the lack of coordination among different levels of government was a main factor affecting public policies in the basin. Although a simple application of the logic upon which qualitative comparative analysis is built suggests that state capacity is not relevant in this causal configuration (namely, if several cases differ in one condition yet have the same outcome, then that condition can be considered irrelevant), this logical conclusion is not applicable to the case of Riachuelo. The historical analysis of the development of environmental disputes and policies in the Riachuelo clearly indicates the contrary. In this case, then, state capacity deficiencies are a central condition to understand the political setting under which this policy issue became judicialized.

Regardless of this difference, it is worth stressing that the Riachuelo does not constitute a "different" type of causal configuration.[340] It shares the same basic combination of conditions with the other policy disputes examined in the chapter. As the historical analysis of the four cases shows, all these public policy conflicts became judicialized under a political scenario in which the social actors posing demands on the state were politically weak, and the executive branch of government was strongly promoting or supporting the policy in question. In short, this chapter provides empirical evidence to argue that when this basic combination of political conditions is present, public policy disputes are likely to become judicialized.

[340] Instead, one could argue that the judicialization of the Matanza – Riachuelo dispute is **over-determined**. In this case, judicialization is linked not only to the lack of enforcement and implementation of existing legislation due to the preferences of the politicians in charge of the executive, but also due to the deficiencies in the capability of the state to implement and enforce those regulations.

CHAPTER 7: POLITICAL ALTERNATIVES AND WEAK JUDICIALIZATION

This chapter describes and compares two policy disputes: the Esquel case about mining policy in the province of Chubut, and the health coverage reform for disabled people promoted by the national government in 2002. These are cases in which legal claims were brought to the judiciary, but the courts and judicial procedures played a very minor role and were not relevant in the unfolding of these policy processes. While in the previous empirical chapters, we have analyzed political scenarios that lead to strongly judicialized policy disputes, this chapter examines political configurations that resulted in disputes in which judicialization was weak. In this way, these *less than more judicialized* policy disputes constitute the negative cases of our study. [341]

The question driving this chapter is why these policy conflicts were not fully judicialized? How did the governance conditions affecting these policy processes differ from the cases of policy judicialization analyzed in previous chapters? The QCA analysis of these cases suggest that when the involved social actors have political leverage, and the legislature is attentive to and active in a policy issue, a dispute is not likely to become fully judicialized even if the executive is opposed to the policy demands made by social actors. This seems to indicate that the opposition of the executive to the policy claims posed by social actor is not a sufficient condition, by itself, to explain the judicialization of a policy issue. If this is correct, it clearly strengths the explanatory leverage of the configurations examined in the previous chapters 5 and 6, in which the opposition of the government combined with other conditions, trigger the involvement of the courts.

[341] In the QCA-fs lenguaje, these are cases that, although they not complety out of a set, they are considered to be "more out than in".

As in the previous empirical chapters, the case studies are composed, first, by a historical description of the development of the policy issue, and second, by a "focused" analysis of the governance conditions affecting each process. Following, I include the fuzzy set coding of the two cases analyzed in this chapter.

Table 7.1: Fuzzy Membership Scores

Cases	*Judicialization*	*Policy Loser*	*Weak Political Leverage*	*Legislature Passiveness*	*Opposition of Executive*	*Deficient State Capacity*
Mining policy Esquel	**.33** (1)	**.33**	**0**	**0**	**1**	**.33**
Health coverage for disabled people	**.33**	**.67**	**.33**	**0**	**.67**	**0**

(1) In fuzzy set language, 1 means a case has full membership in a set, .67 means that a case is more in than out of a set, .33 means a case is more out than in a set, and 0 means a case is clearly excluded from the set. When these scores are translated into Boolean logic, scores 1 and .67 indicate that, in a given case, a causal condition is relevant or present. On the contrary, scores .33 and 0 indicates that a causal condition is irrelevant or absent.

MINING POLICY IN THE ANDES: THE CASE OF ESQUEL

Esquel was one of the first of a series of cases of massive local opposition to policies promoting industrial scale mining operations in Argentina. The project "Cordon Esquel" consisted of an open-pit gold mine, near the town of Esquel, in the province of Chubut. Located at the foothills of the Patagonian Andes, Esquel is the largest town in western Chubut, with a population of approximately 30.000 residents. The proposed project covered an area of approximately 10 square kilometers, including facilities for extraction, processing and waste disposal. It would process the ore using cyanide vatleach technology. This project represented the first attempt for an industrial scale mining

operation in a region where the main economic activities were forestry, ranching and, especially, tourism.[342]

On October 18, 2002, the mining company submitted its environmental impact assessment (EIA) to the provincial mining agency (*dirección provincial de minas y geología)*.[343] At that time, there was some controversy among state actors about whether the mining or the environmental provincial agency was legally entitled to assess the EIA, authorize the project and control the mining operation, but the provincial government reaffirmed its policy that the mining agency was the enforcement authority for the EIA process.[344] A decision, arguably, that aimed to support the development of the Cordon Esquel project, and more generally, of the mining industry in the province. A few days after the presentation of the EIA, the mining agency convened an open public hearing to review the EIA.[345] The public hearing was scheduled for December 4, 2002.[346]

During the subsequent weeks, initial local uncertainty about the mining project turned into massive open opposition. A key factor triggering this process was the

---

[342]Esquel is the gateway to Los Alerces National Park, a very well known natural protected area in the Argentine Patagonia.

[343] During 1999 - 2002, the mining company submitted the EIA reports regarding the exploration stage. These reports were approved by the provincial mining agency, which authorized the exploration activities. Now, the company was submitting the EIA report for the production stage. For a timeline of the entire environmental assessment process of the Esquel project, see Parizeck (2008).

[344]The disputes about which state agency was responsible for authorizing and controlling the project were based on the apparently contrasting provisions between provincial decree 84/97 and provincial law 4032/94. On the one hand, the Decree 84/97 designated the provincial mining agency as the enforcement authority for the federal law 24.585 on "Environmental Protection of Mining Activities". Among other things, this federal law establishes an EIA procedure for mining activities. On the other hand, provincial law 4032 -the General Environmental Law of the province of Chubut- also establishes an EIA procedure for any activity or project that may degrade the environment, but designates the environmental agency as the enforcement authority.

[345] It is worth noting that the public hearing was required by the provincial law 4032, but not by the federal law 24.585. The provincial government (and the company) argued that the EIA procedure was regulated by the Federal law, not the provincial legislation. Therefore, the decision to hold a public hearing was presented as an expression of "good will", rather than as a legal requirement (Gerosa Lewis 2002) . This of course, raised doubts among the local population about to what point the opinions and concerns to be expressed in the hearing were going to be taken into account by the government.

[346] See the web site of the company describing the administrative story of the project (www.minerameridianaustral.com/proyectos_esquel_legislacion.cfm).

government and company's reluctance to make information available.[347] It was extremely difficult for the local residents to get access to information about the project, and especially to the environmental impact study made by the company.[348] "If they don't provide the information it is because they have something to hide" (*"si no dan la información es porque tienen algo que ocultar"*) was the idea that rapidly spread among many Esquel's residents that, up to that time, were not clearly opposed to the project.[349] By the beginning of November, a local network of self-convened neighbors and groups which were following the development of the project formally came out against the mine project, and became the Assembly of Self –convened Neighbors Against the Mine. The assembly began to mobilize and organize the public opposition to the project. Anti-mining graffiti started appearing throughout the town. On November 25, took place the First March against the Mine, which drew large crowds, and for the first time the local opposition movement got coverage from the national media (BSR 2003, 270). Now, local

[347] For instance, the company refused to make public the technology that it was going to use to treat the cyanide, based on the protection of industrial secret, and the government justified the company position. This clearly helped raising doubts about the project (see statement of legislator Llamazares during the legislative debate about this issue, Diario de Sesiones de la Honorable Legislatura de Chubut, November 26 2002, p. 77).

[348] The report made by the Business For Social Responsibility –BSR- (an international NGO hired for the company to assess its communications and communities policies with the local population in Esquel), transcribed an interviewed with a Esquel's resident which is enlightening about the difficulties faced by the local population to access to the information about the project" *"…One interviewee stated that when he heard about the proposed project, his first response was to try to find out as much information as possible about the mine. He began by researching the project on Internet…..but he could find no publicly available information about the project in Esquel. His emails to the provincial Department of Mining were repeatedly ignored. When he asked the company for a copy of the environmental impact study, he was told it was too expensive to copy and he would have to go to the provincial capital of Rawson (which is hours by car form Esquel). He asked to receive a copy on CD, to be able to review the study on his computer at home and was told that this was not possible. This made him indignant. Public information is public information !" he said in frustration…"* (Business for Social Responsability 2003, 6-7).

[349] Phone interviewed with Gerosa Lewis (November 31, 2008). G. Lewis was one of the referents of the local movement against the mine

opposition to the mine project was open and growing as well as the level of tension and conflict within the town.[350]

To certain extent, the political system began to react to what was happening in Esquel. During the first weeks of November, the provincial mining agency requested the company to submit new studies as part of the EIA. Furthermore, the agency decided to postpone the public hearing until January 4, 2003. On November 26, the legislature approved law 4958. The law postponed the public hearing for 90 days, a longer period than the one set by the government, based on the argument that more information was needed about the potential impact of the project. Furthermore, the new law established that the state environmental agency would be in charge of assessing and authorizing the whole EIA procedure (and not the state mining agency as it was preferred by the provincial government). The law was approved with the support of the Peronist legislators (the main opposition party) and a few legislators of the governing political coalition – Alianza- who were critical of the government's mining policy on Esquel (in fact, these legislators were the authors of the bill).[351] The governor partially vetoed the law passed by the legislature. First, he postponed the public hearing for 60 instead of 90 days. The hearing, then, was scheduled for March 29, 2003 (decree 1628/02). Secondly, the governor reaffirmed that the mining agency was the state authority in charge of assessing and approving the EIA for the prospecting and exploration stages of mining projects, but it granted that the environmental agency would be the enforcement authority for the production stage (Decree 1629/02).[352]

---

[350] For a more detailed description of the process of social mobilization against the mine project in Esquel see Gerosa Lewis (2003), also Walter (2008). Moreover, see the Business for Social responsibility report, which included an outline of the main mobilizations and events organized by the movement against the mine (2003, 28-30).

[351] See Diario de Sesiones de la Honorable Legislatura de Chubut (Session November 26, 2002)

[352] This meant that, in the case of the Cordon Esquel project, the assessment of the on-going EIA report would now be done by the environmental agency (Parizek 2008).

Meanwhile the social protest in Esquel kept growing. On December 4, took place the Second March against the Mine, which was as massive as the first one. The assembly, then, decided to organize a march the fourth of every month. Meanwhile, a small group of local lawyers and activists were working on a legal strategy to bring a judicial claim against the government of Chubut and the company. When this proposal of judicializing the conflict was discussed in the Assembly, it did not get much support. Social mobilization was the preferred strategy of most of the participants at the assembly.[353] However, the legal claim was pursued, and on December 16, a *"recurso de amparo"* was filed against the government of Chubut, the municipality of Esquel and the mining company, at a state district court located in Esquel ("Villivar, Silvana c/ Provincia del Chubut y Otros s/Amparo –Expte 1365" 2003). Basically, the plaintiffs asked the judge to suspend all activities related to the mining operation until the public hearing took place and the project was duly authorized according to the provincial law 4.032. The plaintiffs argued that even though the mining extraction had not started yet, the company was building routes, taking mining samples, etc, all activities that were heavily affecting the environment.[354] Furthermore, they asked for the suspension of the project as a provisional remedy while the legal procedure was pending. The main defense of the provincial government and the company was that mining activities were regulated by federal legislation, and therefore, provincial law 4.032 was not applicable.

On February 19, 2003, the district court ruled in favor of the provisional remedy required by the plaintiffs and ordered the temporary suspension of the mining-related activities. The judge stressed that the provincial law requires environmental impact studies to be done and approved before any activity could begin. Both the mining

[353] Interviewed with Gerosa Lewis (November 31, 2008). G. Lewis was one of the lawyers involved in pursuing the legal claim

[354] The plaintiffs also asked the court to order the company to repair the environmental damage already caused.

company as well as the provincial government appealed the decision of the district court. The government brought the appeal directly to the Superior Court of Justice of the province of Chubut based on an exceptional legal channel –article 195 Bis of the Civil Procedural Code of the province. This provision allowed the government to appeal directly to the Superior Court when a provisional remedy granted by a lower court affect "an essential activity of the state". The mere presentation of this petition by the government suspended the resolution of the district court. Hence, the mining activities in Esquel continued.[355]

A few days before the district court's resolution, a decision taken by Esquel's city council greatly changed the dynamic of the conflict. During January and February, there were massive marches against the mine, and the tension within the local community was escalating.[356] On February 6, there was a massive mobilization to the building where the local council was in session. That day, and under the presence of hundreds of local residents who were in the building and its surroundings, the Council unanimously approved municipal ordinance 03/03, authorizing the local mayor to hold a non-binding plebiscite about the mine project Cordon Esquel.[357][358] That decision also signaled a deep change of positions toward the mining project within the political establishment of Esquel. Up to that moment, the local UCR and Peronist party of Esquel (with few

[355] For a detailed analysis of this stage of the judicial procedures, see Gerosa Lewis (2003).

[356] Interview with Gerosa Lewis (November 31, 2008). See also the references made by the local mayor in the media about the increasing level of social conflict in Esquel (El Diario de Madryn, "Por este debate se produjo un daño social irreparable", February 26, 2003).

[357] For brief descriptions of the events during that day, see the media coverage in the regional newspapers such as Diario Cronica from Comodoro Rivadavia ("El Concejo Deliberante de Esquel prohibió el uso de cianuro en su ejido" February 7, 2003) and El Diario de Madryn ("Producto de la Presión Popular: Referéndum vinculantes para la explotación de oro en Esquel", February 7, 2003). It is worth noting that a bill proposing a plebiscite was already submitted to the Esquel city council by a group of local residents in November 2002, but the council did not treat it at that time (Gerosa Lewis 2003) .

[358] The council also unanimously approved an ordinance (02/03) repealing a previous municipal ordinance of adherence to the national and provincial laws promoting mining, and another ordinance (in this case, it was approved by majority vote) banning the storage and use of cyanide in territory of the municipality of Esquel (ordinance 01/03).

exceptions) had supported the project. From that moment on, the local Peronist party was opposed (Scandizzo and Valtriani 2003, 15; also Gerosa Lewis 2003, 256). Meanwhile, the local mayor, Rafael Williams, tried to resist the measure. The mayor belonged to the Alianza, the same political coalition which was in charge of the provincial government. But, under pressure from the city council and local protests, he finally agreed to authorize the plebiscite which was held on March 23, 2003.[359]

During the electoral campaign for the plebiscite, the provincial and local governments openly supported the Yes to the mine project. Nevertheless, the result was an overwhelming victory for the opponents to the mining project. Around three-quarters of Esquel's eligible voters participated (over 15.000 out of 20.000 voters). 81.16% voted against the mine, only 18.53% voted in favor.[360] There were also plebiscites in other small communities and towns around the region (Lago Puelo, Epuyen, Trevellin). In all of them, the NO to the mine won by an overwhelming majority as well.

The first reaction of the provincial government was to minimize the political consequences of the plebiscite. Governor Lizurume publicly announced that there was no legal reason to stop the mining operation in the Andes.[361] However, the results of Esquel's plebiscite were too overwhelming to be ignored by the political system. On March 25, two days after the plebiscite, the Peronist bloc in the provincial legislature presented a bill banning open-pit mining and the use of cyanide in mining operations in the territory of Chubut. It also presented a bill modifying the mining legislation and incrementing the mining royalties to be paid in the future.[362] Two weeks later, on April 8,

[359] It is worth clarifying that, according to the local and provincial legislation, the result of the plebiscite was not legally binding. However, it is clear that it would be extremely costly for politicians to ignore the results of the popular vote. For a legal analysis of the plebiscite see Gerosa Lewis (2003).
[360] For a detailed description of Esquel's electoral results, see Gerosa Lewis (2003, 270).
[361] El Diario de Madryn ("Aún no hay ninguna razón legal para suspender la explotación minera", March 26, 2003).
[362] The political impact of the results of the plebiscite is clearly perceived in the legislative session. Legislators from the government party as well as from the Peronist opposition made references to the

the provincial legislature approved both bills with some modifications. Moreover, law 5.001 banning open pit mining and the use of cyanide was approved unanimously.

Meanwhile, the judicial procedures were still going on. On April 10, 2003, the provincial Superior Court upheld the provisional measure granted by the district court (the Court of Appeal on response to an appeal made by the mining company also upheld that decision of the district court). In practical terms, these judicial resolutions did not have much impact, because the company had already stopped its mining activities a few days before the plebiscite occurred (BSR 2003, 29). On June 9, 2003, the district court finally decided over the core issue of the legal claim. It resolved that the mining project had not fulfilled the requirement established by the provincial legislation, law 4.032, and therefore, it ordered to keep the suspension of the mining operations until the public hearing was carried out and the EIA was duly approved.[363] Again, the company appealed the decision (and in fact, took the case all the way to the Argentine Supreme Court, which finally upheld the district court decision). But this time, the government of Chubut did not join the company in the appeals and accepted the judicial decision.

Relevance of Judicializacion

In comparison to the other judicialized policy conflicts analyzed in the previous chapters, Esquel is a case of weak judicialization. The courts and the judicial procedures, even though relatively relevant at certain moments of the dispute, were not a main

---

electoral results, and to the need for the government to answer to the "message" from the people of Esquel (see Diario de Sesiones de la Honorable Legislatura de Chubut, session 887, March 25, 2003).There were also strong criticisms to the government, even from legislators from the governing coalition. See for instances the speech of Representative Llamazares (Alianza/UCR) who said that many legislators raised their voices against the project but they were not listened by the government (Diario de Sesiones de la Honorable Legislatura de Chubut, session 887, March 25, 2003, 69).

[363] The other claim brought by the plaintiffs about the repair of the environmental damage was rejected by the district court.

scenario in which the policy process unfolded. As described above, there were several different venues in which the policy debate around the mining project took place. But among these different venues, the local level clearly became the main scenario in which the policy conflict developed. The scale and intensity of the social mobilization and protest in Esquel, and particularly, the call for the plebiscite, were local events that shaped the dynamic of the policy process, and around which the other actors and venues revolved, including the judiciary and judicial procedures. It should not be surprising, for instance, that all but one of the provincial courts' decisions against the government's mining policy were taken after the overwhelming result of the plebiscite.[364] Similarly, the provincial legislature only passed the law banning open mining in Chubut after the citizenry of Esquel massively voted against the mining project.

More significant, the judicialization of the dispute was not the central advocacy strategy of the local social movement opposed to the mining project. Most of the advocacy efforts and resources were focused on organizing and mobilizing the public and, latter, on wining the plebiscite. As mentioned above, the decision to file the legal claim was basically a measure taken just by a group of local residents, mostly lawyers, which did not raise much support among the rest of local groups and residents actively involved in the dispute.[365] Social mobilization and political activism were the preferred strategies of the local movement against the mine. In fact, even after obtaining the favorable district court decision granting the provisional remedy (which ordered the temporal suspension of the mining operations), this initial victory in the judicial venue did not change the emphasis of the local groups on social mobilization and political

[364] This was a point stressed by Gerosa Lewis in the interview (November 21, 2008). Only the district court's decision granting the provisional remedy (the temporal suspension of the mining operations) was taken before the plebiscite.
[365] Interviewed with Gerosa Lewis (November 31, 2008).

activism. This has very clear explanation. This judicial decision was taken after the Esquel's local government agreed to hold the plebiscite. Clearly, the decision to carry out the plebiscite represented an important political defeat for the provincial government and the local mayor, and after that, all the efforts and resources of the local groups were placed in the campaign to win the plebiscite. In short, the local level, and not the courts, was the main scenario in which the policy conflict around the Esquel mining project developed.

Analysis of Conditions

As in the previous chapters, the first factor to analyze is whether the social opposition to the provincial government's mining policy can be considered a strict "loser" of the policy process. One could argue that they were policy losers because the social demands to stop the mining project in Esquel were not initially satisfied by the government. In fact, between 1999 and 2002, the company carried out the mining exploration works with government authorization.[366] However, this argument is missing that the core of the social opposition to the Cordón Esquel project only began by the middle of 2002, when the company requested authorization to begin the production of the mine. In order to get that authorization, the company submitted the EIA, but it was never formally approved by the provincial government (despite that the government strongly supported the project). As explained above, in the face of the increasing criticisms and concerns about the project, the provincial mining agency in charge of assessing the EIA requested the company to provide more studies in order for the project to be authorized. Then, the public hearing was postponed in several opportunities which also delayed the

[366] Between 1999-2002, the provincial mining agency approved the EIAs submitted for the company for the exploration stages, and authorized the exploration works (Parizek 2008) .

authorization process. Finally the provincial legislature approved law 5001 banning the type of mining activity that the company was requesting authorization for. In other words, the project "died" before the government was able to finally authorize it.

If my assessment is correct, then, one could question the relevance of examining this case. If the actors obtained what they wanted from this policymaking process, it is obvious they did not need to judicialize their claims. However, this observation is missing the history of the policy process; how it evolved. As mentioned above, although the local social opposition was able to stop the provincial government from allowing the mine to begin production, the provincial executive had previously granted several authorizations to the company which allowed the project to advance to that stage. The interesting feature in this process is that, despite this steady government support for the mining project, the social actors still prioritized political mobilization and political venues to contest the government policy and they did not fully judicialize the dispute. This clearly raises the relevance of this case for this study. Moreover, it requires us to examine the other features of the political scenario in which the policy process developed in order to explain why this dispute was only weakly judicialized.

Accordingly, the second condition to be analyzed is the political leverage of the social actors involved. As described above, Esquel was the epicenter of the social opposition against the mining project and, hence, against the provincial government's mining policy. The Assembly of Self–convened Neighbors Against the Mine was the main "organizational" expression of the local opposition. The assembly was a very heterogeneous network of local residents and groups; it encompassed middle class professionals, researchers from the local university, residents from working class neighborhoods, community organizers, etc. (Walter 2008). The main focus of the

assembly was on mobilizing public opposition to the project. The mass marches against the mine, organized the 4th of every month, are the best example of this. Furthermore, the local mobilization was able to gain attention from the national media and support from non-local political actors (the national ombudsman, national and international NGOs like Greenpeace, etc.). However, beyond these actions, there was a relatively low level of strategic planning and coordination of actions among the different groups and networks of residents.[367] Arguably, this might have affected the ability of the opposing social groups to take part in potential policy negotiations, beyond their rejection of the mining project in Esquel.

Despite these limitations, the leverage of the opposition groups increased as the policy conflict evolved. At first, the ability of the local groups to access the policy process at the provincial level (the central locus of the decision making process) was very limited. In fact, one of the main factors –if not the main one- that helped trigger the massive popular opposition to the mining project was the government and company's reluctance to provide adequate information (BSR 2003).[368] Nevertheless, as the level of local mobilization increased, the provincial government did begin taking notice of the local opposition. For instance, in November 2002, a few days before the first massive mobilization against the mining project in Esquel, the provincial government requested the mining company to submit new studies as part of its EIA. Arguably, the government's measure can be read as an attempt to respond to some of the local criticisms and contain the social protest.

---

[367] As one of the local referents of the Assembly said: "Each one did whatever it could do to contribute to the movement" (interview with Gerosa Lewis, November 31, 2008).

[368] Furthermore, the attitude and discourse of government's official emphasizing the need for technical knowledge and skills to participate in the EIA process, also discouraged neighbors' participation (BSR2003; Walter 2008).

The leverage of the opposition groups was much stronger at the local level. Even though most of the political leadership in Esquel supported the project at first, they could not resist the growing local mobilization against the mine. The best evidence of this is the city council decision to approve, on February 2003, various local ordinances demanded by the movement against the mine, including the organization of the non binding plebiscite.

The result of the plebiscite greatly strengthened the political leverage of the local groups opposing the government's mining policy. As mentioned above, 80% of the voters rejected the mining project. Even though the total number of voters of the Esquel region represents less than 10% of the provincial electorate,[369] the city of Esquel is by far the most important economic and political urban center in the Western part of Chubut. Therefore, the political significance of the result of the plebiscite was enormous, and greatly affected the policy process. The unanimous decision to ban open-pit mining and the use of cyanide in mining operations, taken by the provincial legislature few days after the plebiscite, is a clear evidence of this political impact. In sum, the social opposition to the mining government policy in the Andes was not politically disadvantaged; they were able to access and affect the policy process.

In relation to the provincial legislature, its role in the policy process evolved as the level of social protest in Esquel increased. Between the period 1999 – 2003, the legislative assembly was controlled by the Alianza, a political coalition between the UCR and the FREPASO, which also was in charge of the executive branch of the provincial government. By the middle of 2002, popular concerns about the mining project had grown sharply, but the legislature played a relatively minor oversight role during those

[369] Esquel had around 20.000 voters out of a provincial electorate of almost 280.000 voters for the year 2003 (Tow data base , available at www.towsa.com/andy/totalpais/chubut/2003p.html).

months. It required the government to provide information about the project and held meetings with executive government officials.[370] Furthermore, some legislators visited Esquel and met with local groups opposing the mine project.[371] By the end of 2002, the legislature assumed a much more visible role with the approval of law 4.958, which suspended the public hearing for 90 days until more information was gathered. Law 4.958, then, was approved by a circumstantial majority coalition formed by the Peronist legislators (the main opposition party) and a few legislators from the Alianza who disagreed with the government mining policy. Clearly, the approval of law 4.958 indicates that the government did not control the legislature over this issue, and that the assembly was taking a more proactive role in the policy process.

After Esquel's city government approved the organization of the plebiscite, and as the level of conflict in the region kept escalating, the provincial legislature tried to change the dynamic of the conflict. On February 20, 2003, the legislative assembly approved law 4.972 which suspended the public hearing definitely, until all the needed information about the potential impact of the mining project was available. The bill was presented by the Peronist legislative block and was approved unanimously with the support of the Alianza. Right after approving this law, the assembly approved a declaration asking the city of Esquel to suspend the plebiscite. The declaration was proposed by the Alianza and was approved unanimously with the support of the Peronist legislators. The declaration was justified on the fact that given that the public hearing was suspended, there was no point in carrying out the plebiscite. Instead, the plebiscite should be done

[370] For example, the Peronist legislative block requested information about the industrial secret alleged by the company (see speech of legislator Bernardi -PJ-, Diario de Sesiones de la Honorable Legislatura de Chubut, session November 26, 2002, 60). Similarly, there were requests for information about the transportation of the cyanide (see statement of legislator Llamazares –Alianza-, Diario de Sesiones de la Honorable Legislatura de Chubut, session November 26, 2002, 78).

[371] For example, see the references to meetings with local residents in Esquel made by legislators Llamazares and Risso during their statements in the legislature (Diario de Sesiones de la Honorable Legislatura de Chubut, session November 26, 2002).

after the hearing, when the public had the chance to receive better and more complete information than the one that was available at that time.[372] Arguably, this political agreement between the two legislative blocks represented an attempt to calm the social opposition in Esquel and, especially, to take control over the development of the issue. However, the attempt was unsuccessful attempt because the plebiscite was carried out anyway.

The legislature did, finally, become a main center of political and social attention after the plebiscite occurred. Between March and April 2003, the legislative assembly discussed and approved two laws changing the legal framework for mining activities in the province, and specifically, banning open pit mining and the use of cyanide. By that time, the population of Esquel had expressed its overwhelming rejection of the mining project. In sum, the provincial legislature had a relatively active role in the policy process, although it was not the main venue in which the policy dispute and debate took place. Most of the time, the legislative assembly seemed to be following the development of the events rather than leading the process; nevertheless, it was clearly not a passive actor.

In its turn, the executive strongly supported the mining project in the Cordon Esquel. This support clearly affected the way the government interpreted and implemented existing environmental policy and legislation, so as not to hinder the mining operations. The best example of this might be the governments' arguments in relation to the implementation of the general environmental law 4.032. Basically, the government stated that the provincial law was not applicable to the mining operation but the federal law, which did not require a public hearing in order for the project to be authorized.

[372] See statement of legislator Lorenzo –Alianza (Diario de Sesiones de la Honorable Legislatura de Chubut, session 882, February 20, 2003, 11-16)

Beyond the complex legal debate about this jurisdictional issue, what is clearly surprising is the fact that the provincial government was so openly and eagerly claiming that its own legislation was not applicable.

Similarly, the policy discussion about which state agency should be in charge of assessing and controlling the EIA procedure is an example of the government's policy preferences. Even though one can argue that the legal issues involved were not clear-cut, the government systematically favored the provincial mining agency as the enforcement authority over the provincial environmental agency. Arguably, this was a policy decision aimed to support the development of the mining industry in the province. A state agency focused on promoting mining operations can reasonably be considered a more "friendly" agency for the mining investments than one concerned mainly with environmental quality. Finally, the role of the provincial government during the plebiscite in Esquel constitutes a clear evidence of the government's support for the mining project. As mentioned above, the governor himself actively campaigned in favor of the Yes. Furthermore, after the plebiscite, the first reaction of the provincial government was to minimize the result, so as to maintain the viability of the mining project in Cordon Esquel.[373] In sum, the government strongly supported the development of mining operation in the Andes, and particularly the Cordon Esquel project.

Finally, state capacity issues did not play a relevant role in the unfolding of the policy conflict around the mining project in Esquel. The lack of implementation of the provincial environmental law 4032 was not related to problems of the state apparatus,

[373] Governor Lizurume publicly announced that there was no legal reason to stop the mining operation: *"the residents of Esquel have a right to express their opinions about the development of mining activities within the territory of their municipality, but not in relation to the rest of the province"* (own translation, El Diario de Madryn, "Aún no hay ninguna razón legal para suspender la explotación minera", March 26, 2003) .

like lack of sufficient resources or technical capabilities. Instead, as we explained above, it was clearly due to the policy preferences of the political elite in charge of the executive branch of government. The same can be argued about the fact that the mining agency -and not the environmental agency- was the enforcement authority of the EIA procedure. Similarly, the problems regarding the availability and public access to the information about the EIA were related to political decisions taken by the government and not to deficiencies of the state apparatus. For instance, the government supported the company decision not to make public the information about how it was going to treat the cyanide used in the mining operations (a highly toxic substance), based on the argument that it would violate the protection of trade secret.[374] In short, issues of state capacity were not a factor shaping the process and policy debate around the Cordón Esquel project.

Summing up, in a context in which the social actors opposing the government mining policy were highly mobilized and had political leverage, and the provincial legislature was relatively active and involved in the issue, the courts and judicial procedures did not become a main venue in which the policy process around the Esquel project developed.

HEALTH COVERAGE FOR DISABLED PEOPLE

This case is about a conflict that developed around the national government's attempt during the first months of 2002 to modify health care coverage and services for disabled people. This conflict occurred in the context of the most acute social, economic and political crises affecting Argentina since the return to democracy in the 1980s. In

[374] See statements of legislator Bernardi (PJ) and legislator Llamazares (Alianza) in which they analyzed the government's response to a request made by the provincial legislature precisely about this issue (Diario de Sesiones de la Honorable Legislatura de Chubut, session November 26, 2002, 65-77).

December 2001, president de La Rua had resigned in the midst of huge social protests against government economic policies; the Argentine state had declared itself in default and most services provided or funded by the state were at risk. In January 2002, Senator Duhalde was elected interim president by the national congress.[375] The new administration quickly got congress to approve law 25.561 declaring a broad administrative, economic and financial emergency and delegating legislative power to the executive.[376]

In this context, the new minister of health, Ginés Gonzáles Garcia, began working on an emergency plan for the health care system, especially given the economic situation affecting the social security system.[377] Many *obras sociales* were at risk of financial collapse.[378] Moreover, many were not even fulfilling the PMO (*Programa Medico Obligatorio*) which established the list of medical benefits and services they were required to provide by law.[379] The *obras sociales* as well as private health insurance

[375] Senator Duhalde belonged to the Peronist party, which was the main opposition party during the presidency of Fernando de La Rua (coalition UCR - FREPASO). After the resignation of de La Rua, and after a few weeks in which the office of the presidency changed hands several times, Senator Duhalde was appointed interim president as a result of a broad political agreement between the Peronist party, the UCR, FREPASO and other parties with legislative representation.

[376] Law 25.561 was proposed by the executive and approved with few changes by congress during the session on January 5-6, 2002. The core of the law is about economic and financial issues and policies. The law just mentions social policy when declaring the emergency (article 1) and it does not specify what competences and powers are delegated to the executive regarding this policy field.

[377] As explained in previous footnote 68, the Argentine healthcare system is constituted by three subsectors: social security, private medicine and the public health sector. The social security sector basically covers employees and their families through institutions, called *obras sociales*, managed by each trade union. The private sector encompassed individual practitioners, hospitals, clinics and varied forms of private medical insurance. The public sector is made up of public hospitals (under provincial and municipal authority). In principle, this sector offers free health services to the whole population, but in fact, it mainly serves the poorest sectors of argentine society, those who do not have social security medical coverage and cannot afford private health services.

[378] See, for instance, the media statement made by the head of social services (*Superintendencia de Servicios de Salud*), an agency belonging to the minister of health, regarding the financial crisis affecting the system of *obras sociales* ("las obras sociales en crisis no serán subsidiadas. El día que se corto el chorro", Pagina 12, February 2, 2002).

[379] The *Programa Medico Obligatorio –PMO-* was established in 1995 (decree 429/95). It establishes the list of medical benefits that all national *obras sociales* were required to provide to their members. In November 1996, congress passed law 24.754 which required private health insurers to provide the PMO to their clients as well.

companies were extremely critical of the existing PMO because it basically required them to provide a too broad and generous coverage.[380] In particular, they argued against coverage for high cost illness including disabilities which were considered to increase their costs excessively.[381] It is worth noting, however, that these criticisms about the coverage of disabilities were not new among the *obras sociales* and private medical insurers. In fact, already during the 1990s, they lobbied against the passing of law 24901 which established a basic package of benefits for disability coverage and included that coverage in the PMO.[382]

On March 13 2002, by decree, the government declared the national health system in a state of emergency (decree 486/02). Basically, the declaration of emergency allowed the national health minister to redefine the PMO (article 18). In relation to the health coverage of disabled people established by national law 24.901, the decree similarly allowed the health minister to redefine which basic health services were considered essential (article 34).[383] In order to implement this provision about the coverage for disabled people, the minister of health delegated to an administrative board -*Directorio del Sistema Único de Prestaciones Básicas para Personas con Discapacidad*- the task of defining which benefits and services were considered essential. This board was composed by the different ministers and states agencies with jurisdiction over disability issues.[384] Moreover, the board had two institutions representing the non-profit sector working on

[380] See coverage of La Nación on this issue ("Limitan el plan obligatorio de salud", April 9, 2008).
[381] See, for instance, presentations made by representatives of different *obras sociales* and private health insurers at the Second Conference on Health organized by the journal Medicos ("La gran muralla solidaria", Revista Medicos Nro. 23, December 2002).
[382] Phone interview with Pablo Molero (September 13, 2008). For a more detailed analysis of the system of basic coverage for people with disabilities established by national law 24.091 and how it works, see Esquivel and Figari (2006).
[383] According to article 34 (decree 486/02), basic and essential benefits are defined as those needed for the preservation of life and treatment of illness.
[384] For more information about the *Directorio del Sistema Único de Prestaciones Básicas para Personas con Discapacidad* see the web site of the national commission for the integration of disabled people - CONADIS (http://www.cndisc.gov.ar/doc_publicar/spb.htm; cited October 10, 2008) .

disability issues. At that moment, the NGO representatives were from Cotolengo Don Orione (a very well known association in Argentina that provides health services to the poor, including people suffering disabilities) and the Commission for People with Disabilities belonging to the Catholic Archdiocese of Buenos Aires.[385]

As expected, there was a strong and widespread opposition to decree 486 among the NGOs working on disability issues. This opposition included the non-profit organizations that provide services to disabled people as well as the more advocacy oriented NGOs. The main argument against the decree was that article 34, by establishing that basic benefits for disability were only those needed to preserve life and to treat illness, was excluding education, rehabilitation and other benefits critical for the quality of life of disabled people.[386] Even before the decree was issued, NGOs were already lobbying government officials against including disability coverage in the health emergency declaration. After the policy decision was taken, the level of NGO opposition increased and networks of parents and families of disabled people became more active in the conflict.[387]The FORO-PRO *(Foro Permanente para la Promoción y la Defensa de los Derechos de las Personas con Discapacidad),* a network of over 500 NGOs and individuals working on disability issues in Argentina, played a significant role articulating some of the advocacy efforts. Congress also became a venue for the debate around the health emergency and its impact of the coverage for disabled people. During March 2002, two bills were presented in the Senate declaring that all benefits established by law 24.901 should be considered essential and therefore could not be restricted by the

[385] During March 2002, the board began working on the issue. It formed a smaller technical commission to analyze the issue and make a proposal. After several meetings, the commission agreed to propose a basic nomenclature of services and benefits, but with substantially smaller payments to the institutions providing services to disabled people. Among the associations and pro-disabled rights groups, it was believed that this would greatly affect the quality of services.

[386] Interviews with Pablo Montero (September 13, 2008), and Isabel Ferreira (August 15, 2008).

[387] Interview with Pablo Montero (September 13, 2008).

health emergency declaration. These bills were authored and supported by legislators from the opposition and government party.

While advocacy actions were being developed at the administrative level and at the congress, there were also initial actions to judicialize the conflict. On March 17, a group of associations, parents and legal representatives of disabled people brought a *"recurso de amparo*" against the national government at a federal district court in the city of Buenos Aires ("Fendin y otros c/PEN-dto. 486/02 s/amparo ley 16.986" 2002).[388] The plaintiffs requested the court to declare article 34 of decree 486/02 unconstitutional because it arbitrarily restricted the system of benefits for disabled people established by law 24.901. Furthermore, while their legal claim was being substantiated, they requested the application of article 34 to be suspended as a provisional remedy. During the next few days, similar legal actions were filled by other NGOs and groups of parents in different provinces of Argentina (Molero 2002a).

Despite these advocacy efforts, the health minister was unresponsive to the social actors demanding policy changes. Moreover, Minister Ginés Gonzáles Garcia did not even meet with the involved associations and parents group to discuss this issue, despite repeated requests for audience.[389] This situation changed significantly after the involvement of Hilda "Chiche" Duhalde, who was the wife of president Duhalde and, at that time, also the head of the National Council for Social Policies. Ms. Duhalde had forged a political career based on her work on welfare issues, and had strong contacts with catholic organizations. Precisely through contacts in the Catholic Church, the NGOs got access to Chiche Duhalde, and sometime by the end of March 2002, they had a

[388] The plaintiffs were members of FOROPRO. The case was brought to the Juzgado Federal en lo Contencioso Administrativo Nro. 3.

[389] In our interview, the FORO PRO's coordinator, priest Pablo Molero stressed several time that Minister Ginés Gonzáles Garcia was completely unresponsive to their request for a meeting to discuss the issue. In his view, it seems as there was no margin for negotiation with the health minister, it was an already settled policy decision (phone interview with Pablo Molero, September 13, 2008).

meeting with her in which they discussed the potential problems and threats posed by the new governmental policy to the health coverage for disabled people (Molero 2002b).[390]

A few days later, on April 2, at the meeting of the *Directorio del Sistema Único de Prestaciones Básicas para Personas con Discapacidad,* Minister Ginés Gonzáles Garcia announced that the government will derogate the polemic article 34.[391] On May 10, 2002, the government passed decree 788/02 formally derogating article 34 of decree 486/02.[392]

Between the announcement of Minister Ginés Garcia and the issue of decree 788/02, the judge hearing the case in *"Fendin y otros c/PEN"* favorably resolved on the provisional remedy request by the plaintiffs and ordered article 34 not to be implemented temporarily. However, by that time, the fate of article 34 was already politically settled and the decision to change the policy had already been made.

Relevance of judicialization

As described above, the actors opposing the minister of health's policy on disability coverage carried out different advocacy measures and efforts including litigation. However, the courts and judicial procedures clearly played a very minor role in this case, and did not constitute a main scenario in which the policy debate and process unfolded. The NGOs' access to Chiche Duhalde, a very high level political figure in Duhalde's government, and her quick response and involvement in the dispute,

[390] It is worth mentioning that Pablo Molero, the coordinator of FORO-PRO, was a Catholic priest. Moreover, many of the institutions providing health and other services to disabled people were also related to the Catholic Church (for instance, the Cotolengo Don Orione).
[391] It is worth noting that "Chiche" Duhalde was also present at that meeting (Molero 2002b).
[392] In its justification, decree 788 stated that there were no agreements among the members of the *Directorio* regarding the extent and the possibility of implementing article 34. Moreover, it acknowledged that different associations and institutions working on disability issues had expressed their concern about the potential impacts that article 34 could have on the services provided to disabled people.

significantly changed the dynamic of the conflict. Arguably, it was her involvement which opened the possibility to review the health minister's policy despite the initial unresponsiveness of the government officials involved in the matter. In this context, the judicial procedures became a quite irrelevant site for the policy negotiation between the parties involved in the issue.

Analysis of conditions

Initially, the social actors opposing the government's policy on coverage of disability were clear losers of the policy process. Despite their advocacy efforts, the minister of health passed decree 486/02 declaring the health system in state of emergency which opened the possibility of restricting the coverage for disability.[393] However, they were not politically disadvantaged groups. They had access to the policy process. For instance, the NGO sector had representatives in the *Directorio del Sistema Único de Prestaciones Básicas para Personas con Discapacidad,* and as described above, this board was in charge of defining which benefits and services would be considered essential according to the terms of article 34 of the decree 486/02. Moreover, they had contacts and institutional relationships that allowed them to gain access to the political elites, as it was the case with Chiche Duhalde. In sum, although they were initial losers in the policy process, the networks of associations and NGOs working on disability issues were able to access and be part of the policy negotiations.

[393] In contrast, one may argue that the NGOs were not policy losers in a strict sense because they were basically demanding the application of law 24.091, which was being somehow violated by the new government's policy. Nevertheless, it worth remembering that congress had delegated legislative powers to the executive given the crisis affecting Argentina, and decree 486/02 was issued by the executive based on those emergency powers.

In relation to the national legislature, congress was to a certain extent quite attentive to this policy conflict. As explained above, in the context of the very acute economic and social crisis affecting Argentina at the beginning of 2002, the national congress delegated broad legislative powers to the new interim government led by Senator Duhalde.[394] Although these powers arguably mainly referred to economic and financial policies, the new government also used the power delegated by congress to promote changes in the social policy realm, as was the case of the health care emergency. Nevertheless, congress reacted to the policy changes made by the government in relation to the health coverage of disabled people, and attempted to get involved in the policy debate.[395] As mentioned above, during March 2002, a few days after the government issued decree 486/02, two bills were presented in the Senate stating that the health emergency declared by the government should not affect the benefits and services for disabled people established by law 24.901. These bills were authored and sponsored by legislators from the opposition and the government's party.[396] Both bills were integrated in one version that was unanimously approved by the Senate on August 1, 2002, although by that time the government had already derogated article 34 of decree 486/02. In short,

[394] Law 24.091was approved with the support of the Peronist legislative blocks (the party of government), and most of the opposition. The UCR (the largest opposition party) and the FREPASO voted in favor of the law.

[395] After the legislative election of 2001, the Peronist party controlled the Senate and was the first minority in the House of Representative. However, the Peronist legislative blocks were not easily controlled by Duhalde's government. It is worth remembering that Duhalde became President not because he won a presidential election but because he was appointed by congress after the resignation of president de La Rua. Although Duhalde's appointment was a result of a broad political agreement between the Peronist party and the other main parties with legislative representation, his control over the Peronist legislative majority was relatively weak.

[396] One of the bills was authored by Senator Negre de Alonso from the Peronist party and sponsored by Senator Vilma Ibarra from FREPASO, one of the opposition parties; the other bill was authored by senator Carlos Maestro, from the UCR, the main opposition party (See online data base, Honorable Senado de la Nación Argentina, files 234/02 and 205/02). Similarly, in the House of Representatives, a group of legislators from the UCR sponsored a resolution requesting the government not to modify the coverage established by law 24.901 (see online data base, Cámara de Diputados de la Nación Argentina, file 2331-D-2002).

in spite of the legislative delegation approved by congress few months earlier, the national legislature was not passive in relation to the changes in the disability health coverage promoted by the government.

In its turn, state capacity issues were not relevant in the development of this policy conflict. Although the economic crisis affecting Argentine at that time arguably impacted the state's resources, the government's reform of health coverage of disabled people was mainly triggered by the critical financial situation affecting the *obras sociales* system, linked to the trade unions.[397] In contrast to state capacity issue, the changing policy preferences of the executive branch of government did play a central role in the unfolding of this policy process. As described above, Health Minister Ginés Gonzáles Garcia was a main force behind the declaration of the health emergency, and despite the critiques and protests of associations and institutions working on disability issues, he was not responsive to their demands to exclude disability coverage from the emergency declarations. However, the involvement of Chiche Duhalde signaled a change in the receptivity of the government to these demands, and ultimately, opened the way to reviewing the health minister's policy in the matter.

Summing up, in a context in which the social actors opposing the national government's policy had access to the policy process and political leverage, and congress was relatively active and involved in the issue, judicial procedures did not played a relevant role in the development of the conflict around the reform of the health care coverage for disabled people.

[397] See above, footnote 378.

CONCLUSIONS

Although legal claims were brought to the courts in each case, judicialization was not central to either of these policy disputes. In the Esquel case, the main venue for policy contestation against the provincial government mining policy was the local political level. In the health emergency case it was direct negotiation with the political elites in charge of the government. In both cases, developments in the judicial sphere followed the developments of the policy processes that were taking place in some other venue. In the Esquel case, most judicial resolutions occurred after the plebiscite had taken place and the provincial legislature passed the law banning open pit mining. Similarly, in the disability case, the first substantial resolution of the court suspending the application of health care emergency for disabled people occurred after the government had modified its original policy.

The question is, then, why were these policy conflicts not fully judicialized? How did the governance conditions affecting these policy processes differ from the cases of policy judicialization analyzed in previous chapters? Both of these cases of weak judicialization shared a similar causal configuration, except in relation to the policy loser factor. In the case of health coverage for disabled people, the social actors opposing the national government policy were losers of the policymaking process; despite their opposition, the minister of health declared the health system in state of emergency restricting the coverage for disability. On the contrary, in the Esquel case, the social actors were able to stop the provincial government from authorizing the mine to begin producing, although the government had previously granted several authorizations that allowed the project to advance to that stage. In principle, the different "value" of this condition in the two cases indicates that this factor, by itself, cannot explain the low relevance of the courts in these policy disputes. Moreover, it suggests that weak

judicialization can occur in both scenarios: when the social actors contesting a government decision are strict losers of a policy process as well as when they are not.

In contrast, in both cases, the social actors opposed to the governments' policies, were not politically disadvantaged groups. In the Esquel case, the social opposition to the mining government policy was massive and highly mobilized; it gained the public space and public attention through mass demonstrations and mobilizations which clearly shaped the dynamic of the conflict. Moreover, by winning the plebiscite by an overwhelming majority of the popular vote, the opposition movement showed its political strength. Meanwhile, in the health care emergency case, the political leverage of the NGOs and groups working on disability issues was based on their inside access to the policy process and policy makers, and their links to elites actors, mainly the Argentine Catholic church. The fact that they were able to personally involve Chiche Duhalde - a high rank political figure of the government at the time - in the policy debate about disability coverage, clearly speaks to the capability of these social actors to access the political elites.

Similarly, in both cases, the legislatures were relatively involved and active in both policy issues. In the Esquel case, the legislature initially attempted to reform the government's mining policy by postponing the public hearing until the mining company would provide more information, and by appointing the environmental agency as the enforcement agency. After the plebiscite, the legislature took a more radical position regarding the government's mining policy, and banned open pit mining in the territory of Chubut, ending the Cordon Esquel project. In the health care case, although the national congress had delegated legislative powers to the executive to issue emergency legislation, congress reacted when the government reform affected the health coverage for disabled people. Furthermore, the legislative opposition crossed party lines. In fact, legislators

from the governing Peronist party and from opposition parties submitted bills against the health minister policy on disability coverage.

Finally, in both cases, the policy preferences of the executive were clearly opposed to the preferences of the involved social actors. In Esquel, the provincial government strongly supported the mining project. In the disability case, the national health minister was the main force behind the declaration of the health emergency restricting the coverage for disabled people. However, in neither case, the role of the executive led to the full judicialization of these policy disputes.

This is a critical feature when compared to the causal configurations examined in chapter 5 and 6. In these previous two chapters, the judicialization of the policy conflicts occurred in contexts in which there was executive opposition in combination with a deferential and passive legislature (chapter 5) or in combination with politically disadvantaged social actors (chapter 6). This indicates, first, that the opposition of the executive to policy claims made by social actors is not a sufficient condition, by itself, to drive and sustain the demand for judicial intervention in a policy process. Second, it stresses the explanatory leverage of the configurations identified in chapters 5 and 6. In other words, when the opposition of the executive combines with the other political conditions specified in each of these configurations, then it is very likely that the courts and judicial procedures would become a main venue where the policy process and negotiations can evolve, because either there are no other political venues open to the social actors involved in the dispute (chapter 5), or because these actors do not have political leverage to access and engage the government in policy negotiations (chapter 6). Framed in a different way, these cases suggest that in contexts in which the involved social actors have political leverage and the legislature is attentive to an issue and

involved in the policy process, judicialization is not likely to be relevant. In other words, judicialization is likely to be weak.

CHAPTER 8: CONCLUSIONS

As stated in the introductory chapter, this study claims there are certain regularities, certain patterns in how a democratic polity works that drive the demand for judicial intervention. Furthermore, it argues that instead of a single, general explanatory factor, there are several, different conditions or combinations of conditions that trigger the involvement of courts in public policy. In other words, there is not just one, but various, alternative political scenarios which are likely to drive the judicialization of policy. Within this conceptual framework open to the possibility of equifinality, my study shows that the existing theoretical explanations (namely, the political disadvantage and the legislative fragmentation arguments, including a strict formulation of the policy loser argument as the one developed in our study) can account for certain types of cases of policy judicialization, but not for others. In particular, these theories cannot fully explain the judicialization of disputes related to the lack of enforcement or implementation of existing legislation.

Accordingly, my dissertation argues that the demand for judicialization of policy can also be triggered by weak rule of law scenarios. In these political contexts, the policy goals and measures demanded and claimed by social actors are already part of the existing normative framework, but these goals and mandates are not realized in practice because either the state apparatus is unable to implement or enforce these policies, or the political elites in charge of the executive do not fully support those existing policies, and the legislature is too passive and deferential towards the executive on that matter. When social actors face these political contexts, they are likely to turn to the courts and judicialize their policy claims.

To assess this argument, I developed, first, a qualitative comparative analysis (fs-QCA) of 13 major policy disputes that occurred in Argentina during the last two decades. As a result of fs-QCA analysis, I identified three (3) configurations of political conditions as sufficient to trigger the judicialization of policy. Two of these combinations clearly fit with my theoretical argument and expectations about what political scenarios are likely to lead to policy judicialization in Argentina, while the third combination closely reflects the political disadvantage argument. Then, I carried out a detailed case study of each of the 13 disputes. The historical analysis of the cases confirmed the validity of the basic, causal configurations resulting from the QCA.

This chapter concludes the project. First, it reviews and summarizes the main arguments and findings of the study. Second, it outlines its theoretical implications, stressing that the study provides a typological framework for analyzing the political sources driving the judicialization of policy disputes in democratic regimes. Finally, it analyzes how the findings and results of the study shed light on the role that judicialization and courts play in democratic politics.

JUDICIALIZATION OF PUBLIC POLICY IN ARGENTINA

As explained above, based on the analysis of 13 main policy disputes, this study identifies three main types of combinations of conditions which drive the demand for judicialization of public policy in Argentina. In the following paragraphs, I will briefly summarize the research's results in relation to each one of these combinations, focusing especially on how the different political conditions and dimensions interact in each type of political scenarios. Needless to say, this is just a brief overview of the analysis developed in detail in each of the empirical chapters.

In the first place, I review the weak horizontal accountability scenario and how it leads to the judicialization of public policy. As described in chapter 5, four of the judicialized policy disputes examined by this study can be explained by this type of political configuration (the land tenure program for indigenous communities in Jujuy, CEAMSE's waste disposal policy in the Punta Lara landfill, the re-negotiation of the public utilities concessions during the Duhalde government, and the indigenous land rights conflict in the province of Salta). In all these cases, the groups making demands to the state were not strict losers of the democratic policymaking processes. Their claims were based upon existing legislation which established relatively clear policy mandates that were not properly fulfilled or enforced by the state.

In all these policy disputes, the key political factor explaining the lack of proper implementation or enforcement was the opposition of the political elites in charge of the executive government to comply with the existing normative framework. For instance, in the case of the indigenous land program in Jujuy (PRATPAJ), the provincial government not only was extremely slow in transferring land property rights to the indigenous communities as mandated by the existing legislation, but also, through other agencies of the state, the government was taking measures that clearly contradicted and weakened the indigenous land program. A similar situation occurred in the case of indigenous land in the province of Salta, where the administration of governor Romero did not take the necessary measures to transfer the communal land right to Lhaka Honhat as established by provincial norms, and instead, it began granting individual property rights over the same land. Similarly, in the case of the public utility contracts, the Duhalde administration made several different attempts to increase the tariffs independently of the contract renegotiations, even though the Emergency Law 25561 explicitly stated that any changes in the tariffs ought to be part of a general renegotiation of the contracts.

Likewise, in the case of the Punta Lara landfill, the government of the province of Buenos Aires tacitly endorsed CEAMSE's decision to dispose outer jurisdictional waste in Punta Lara and to expand the landfill capabilities; in this way, the provincial government neither fully exercised its power to control CEAMSE nor attempted to enforce the existing environmental legislation.

Furthermore, in all these policy disputes, the legislative assemblies were quite passive. They did not fully exercise their check and balance powers, allowing the executive to apply the disputed legislation according to its own policy preferences, or even not to apply it at all. For instance, in the case of Jujuy, the provincial legislature clearly failed to exercise its oversight role over the government's implementation of the indigenous land program. This should not be surprising given that the Peronist party, the party in charge of the executive government, also controlled the legislature. Likewise, in the dispute about the public utility tariffs during the Duhalde administration, the national congress also played a quite passive role. First, the government reduced by decree the power of the bicameral legislative commission in charge of following the public utility re-negotiations. Later, the government modified law 25561 by a decree of necessity and urgency, and tried to open a window to raise the tariffs without renegotiating the public utility contracts. In neither situation, congress reacted to the executive initiatives.

In sum, the social demand for the involvement of the courts in these public policies occurred in political contexts that were characterized by the resistance, or even the open opposition, of the executive branch of government to act according to existing regulatory frameworks or to implement existing policies. Furthermore, this discretional behavior of the executive government was backed up by a passive and deferential legislature, which did not fully exercise its oversight powers, and allowed the executive to interpret and apply existing laws and policies according to its own policy preferences.

This combination of discretional exercise of executive powers and relatively passive legislatures underlines the chronic problem of weak accountability affecting democratic governance in Argentina (O'Donnell 1994; Morgenstern and Manzetti 2003), which ultimately, constitutes one of the main sources of the judicialization of public policy issues in this country.

This scenario, however, also raises the question as to what extent the courts would be willing to make the government accountable for its lack of compliance with existing legislation. In fact, a predominant view within the judicial politics literature argues that when political power is not disseminated or there is a single dominant party or political coalition, courts tend to be more deferential to the political branches of government and less likely to confront governmental policies (Ferejohn 2002; Ginsburg 2003; Chavez 2004; Chavez et al. 2011). In this type of situations, then, it is reasonable to expect that actors would not turn to the courts to make claims against the government. However, my research provides strong evidence showing that, in contrast to the expectation of the literature, judicialization still occurs in political contexts characterized by unified governments or the presence of a relatively dominant political coalition.[398] How can this be possible?

As I pointed out in a previous chapter, a way to address this paradox is by distinguishing between the supply and the demand side of judicalization (Clayton 2002). As mentioned above, there is a large body of research supporting the argument that the political context does matter on how judges and courts behave, and more specifically, that political competitiveness and fragmentation of political power tend to produce more

[398] I have already made this point in a previous footnote, but it is worth mentioning again: even if we are referring to cases of unified government or dominant political coalitions, we are working under the assumption that there is a relative level of judicial independence. If a case is lacking even that minimum level of judicial independence, then it is clearly outside the scope of applicability of our argument, because one of the necessary, enabling conditions for judicialization, is missing (for a discussion on the scope conditions, see chapter 2).

powerful judiciaries, willing to control and decide against governments' interests (for the application of this argument to the Argentine case see, Chavez 2003;; 2004).Meanwhile, in relation to the demand side, the existence of a competitive and balanced political system suggests that the actors have viable, alternative institutional channels –including the courts- to pursue their policy goals.[399] However, this is not the case of the four policy disputes I examined and described above. In these disputes, the social actors were contesting government actions (or inaction) in political contexts characterized by the presence of relatively dominant political coalitions and situations of unified governments. For the actors involved in these disputes, the courts and judicial procedures arguably represented the last or even the only feasible institutional channel available to pursue their demands and seek a policy resolution to their concerns. The historical development of these policy disputes depicts the demand for judicialization less as a result of strategically made decisions, based on calculated assessment of costs and benefits of the different options open to the actors involved, and more as a consequence of context driven processes, characterized by the inertia and unresponsiveness of elected branches of governments and state agencies. In this type of contexts, even if the actors foresee that the courts might rule against their claims, the judicialization of the dispute allows them at least to "force" the government to address their claims and to provide a response, justifying its actions or inactions.[400]

[399] In these types of contexts, one would expect that social and political actors would turn to the judiciary when the system is too fragmented and, therefore unable, to produce policies, o when the actors are strict losers of the policymaking process and therefore they try to achieve their goals through the courts.

[400] As explained by Peruzzotti and Smulovitz (2002), one of the more interesting and appealing features of legal mobilization is that once a policy claim against a government agency is admitted in a court of law, the government is required to provide an official and formal response. In other words, the government has to justify its action or inaction. This is not necessarily the case when social actors pose policy demands to executive officials or submit bills to the legislature, where policymakers can simply ignore their claims or proposals.

The second scenario is built around the notion of state deficiencies (chapter 4). Three of the policy conflicts examined by this research are explained by this configuration (the national production of the FHA vaccine, the health and food emergency affecting indigenous communities in Chaco, and the provision of medicines and treatment for people living with HIV-AIDS). In all these cases, the social groups making claims on the state could hardly be considered losers of the policymaking processes. Their demands were largely based on already existing legislation or administrative regulations which were not fully or properly implemented or enforced. However, in contrast to the weak accountability scenario describe above, the lack of policy implementation in these cases was not due to the opposition of the political administrations in charge of the executive, but rather to problems in the capability and organization of the state apparatus to fulfill the goals and commitments made by the elected branches of government.

Some can still argue that these policies were not properly and timely implemented by the state apparatus because - at the end - they were not priorities for the political elites in charge of the government. Above, I have already discussed this argument, and pointed out its limitations. Here, I just want to stress again that there is a significant conceptual and empirical difference between a situation in which an executive government is reluctant, or even opposed to implement a policy approved through the democratic decision-making process, and therefore it forestalls the state bureaucracy to comply with that legislation; and a situation in which a government takes some minimum and necessary steps to implement a policy, but they are not sufficient or effective enough to overcome the state capacity problems weakening the implementation of that policy. Clearly, these are two different types of political scenarios leading to the judicialization of a policy issue. In the former, the demand for judicialization is activated and sustained

by the lack of political will of the politicians in charge of government to comply with the rule of law. In the latter, the involvement of the courts is driven by the weaknesses of the state apparatus to properly and timely implement or enforce a policy. In the three cases I mentioned above (the production of the FHA vaccine, the provision of HIV-AIDS medicines, and the health and food emergency in Chaco), the involved administrations took a very basic but fundamental step needed to implement a policy: they assigned budget funds to carry out the policy measures in question. This indicates that these governments were, at least, not openly opposed to these policies and were not reluctant to comply. However, in all three cases, policy implementation was greatly limited and affected by different structural problems in the operation and organization of the state apparatus.

Furthermore, the deficient capability of the state to intervene in these policy issues was clearly independent from changes in the political administrations in charge of the executive. In fact, there were different administrations involved in each of the policy disputes, and despite the political changes, judicialization continued in all of the cases. This is very clear in the case of the health and food emergency in Chaco. The involvement of the courts began during the administration of governor Nikish (UCR), who took measures to address the emergency that were largely considered insufficient by the indigenous groups and their allies. The new administration of governor Capitanich (PJ) was much more accessible to the indigenous groups and took more aggressive measures to address the emergency, however, the situation in the communities did not change significantly, and the judicialization of the issue continued.

In sum, the sustained demand for judicial involvement in these disputes was driven by serious state deficiencies in the implementation of existing policy mandates. This occurred in contexts where the executives were not openly opposed to these policies,

and the legislatures were relatively attentive to the policy issue. In this context, actors turn to the courts not because they are losers of the policymaking process, but because the state cannot fulfill the policies goals and deliver the public goods committed by the political branches of government. In short, this scenario stresses that lack of implementation or enforcement resulting from problems of state capacity, rather than from the opposition of the politicians in charge of the government, constitutes a main source of judicialization of certain policy issues.

However, one may question why actors would turn to the courts in this type of scenarios. If the problem is the lack of capability of the state to properly implement a policy, then what can be achieved through the involvement of the courts? To answer these observations, it is important to revisit the notion of state deficiencies. Following Mainwaring (2006), the idea of state deficiencies depicts a state that has organizational and capability problems to properly implement or enforce existing legislation in certain policy fields, but it is not a failed state. That is, the state is not entirely unable to carry out its functions. On the contrary, the idea of state deficiencies implies that the state has a basic policy infrastructure in place, but it does not fully and efficiently organize and use its resources and capabilities (Brinks and Gauri 2008). The case about provision of medicines for people with HIV-AIDS is a clear example of this situation. Despite significant budget increases, the state apparatus had serious organizational deficits that greatly affected the proper and timely implementation of the policy in question. Similar state deficiencies affected policy implementation in the FHA vaccine case and in the health and food emergency in the Chaco. In this type of cases, then, judicialization works as a kind of fire alarm system (McCubbins and Schwartz 1984; also Brinks and Gauri 2008). Actors turn to the court, not to demand radical policy changes, but to call the attention, and to seek solutions, about gaps or shortcomings in the operation of an

existing policy infrastructure. This feature is very clear in our three disputes mentioned above. In none of these cases, the involved actors were demanding sweeping reforms that were obviously beyond the capability of the state in question. Instead, their claims and demands were pointing out and making visible specific failures and deficits in the organization and operation of state resources and capabilities.

Finally, the third scenario identified and analyzed by this study (chapter 6), outlines the lack of political leverage of the actors involved in a policy dispute as a main factor triggering the judicialization of certain policy issues. Four of the judicialized policy disputes examined in this study fit this explanation (the re-structuring of the phone tariffs, the dispute about oil drilling in Llancanelo, the re-negotiation of the metropolitan train concessions, and the conflict over environmental pollution in the Matanza-Riachuelo basin). In the case of the re-structuring of the phone tariffs, the "organized" consumer movement in Argentina was just emerging when the issue of the tariff re-structuring began to be discussed during the first part of the 1990s. This clearly affected the capability of the consumer activists to develop coordinated advocacy efforts and to mobilize the broad public of phone users against the government's attempt to increase local phone tariffs. Similarly, in the dispute about oil drilling in the Llancanelo wetlands and about the renegotiation of the train concessions, the main opposition was embodied by NGOs that had a small organizational structure and limited capability to reach and mobilize a broader constituency against the government's policies. Meanwhile, in the case of the environmental pollution in the Matanza – Riachuelo basin, collective demands and protests were fragmented and focalized (usually following specific environmental emergencies affecting particular neighborhoods) and broad social attention and mobilization could not be sustained though time. Clearly, this affected and limited the

political leverage of those social actors that were actively demanding more structural policy changes in the basin.

A significant characteristic of these policy disputes is that the social groups putting demands on the state were, in some of the cases, strict losers of the policymaking processes; while in others they were not. The policy loser status is quite clear in the cases of the re-structuring of the phone tariffs and the re-negotiation of the metropolitan train concessions, in which the involved social groups were opposed to policy reforms championed and finally approved by the governments. Instead, in the cases of Riachuelo and Llancanelo, the involved social groups were demanding the governments to implement and enforce existing legislation and policies. At this point, it is worth analyzing in some detail these different combinations between the lack of political leverage of the actors involved and whether these actors are losers of the policy process. Theoretically, when both of these conditions are present, it is reasonable to expect that judicialization will occur.[401] In other words, social actors with low political leverage and limited access to the policy venues would tend to judicialize their policy claims because they are either losers or likely losers of the democratic policymaking process. This is a relatively common scenario for judicialization, which has been already intensively documented by the literature on legal mobilization.[402] Among our cases, the judicialization of the phone tariffs and of the train concession clearly fit within this explanation.

The second combination, however, is quite counterintuitive. In this type of cases, the actors turning to the courts are politically disadvantaged but are not strict policy

[401] This expectation, of course, assumes that the enabling conditions for judicialization are present (see chapter 2).

[402] This is the scenario, for instance, faced by African American and civil right groups in the South during the time of the Jim Crow laws.

losers; they are demanding the enforcement of existing policies and legislation. There might be various and different reasons explaining why the political branches of government passed regulations and established policies that favor sectors of society with low political leverage. Whatever the reasons, the relevant point here is that when social actors call on the state to implement or enforce these norms and policies, these groups cannot be considered strict losers of the democratic policymaking process. The disputes about Riachuelo and Llancanelo clearly respond to this pattern: the involved social actors were requesting the enforcement of existing environmental policies and rules but they had limited political leverage to advocate and advance their policy goals thought the political venues. Facing these contexts, the actors turned to the courts.

In sum, the analysis of these combinations between whether the actors involved had political leverage and whether they were policy losers, provides insights about the different political dynamics that lead to the judicialization of policy in these configurations. At the same time, it also makes clear and evident that the lack of political leverage was the key factor driving the process of judicialization in all these cases.

At this point, it is worth briefly revisiting our two cases of weak judicialization analyzed in the previous chapter 7 (the Esquel case about mining policy and the health coverage reform for disabled people). As explained above, these are disputes in which the social actors turned to the courts and judicialized their claims against the state, but the judicial procedures did not become a relevant venue in which the policy process and debate unfolded. My analysis indicates that when the involved social actors have political leverage to access policymakers and policy negotiations, and the legislature is active and involved in a policy issue, judicialization is likely to be weak even if the executive is initially opposed to the policy demands made by the social actors.

This "weak judicialization" configuration has two important implications for my analysis of the political factors that can trigger judicialization. First, it suggests that the opposition of the executive to policy claims made by social actors is not a sufficient condition, by itself, to drive and sustain the demand for judicial intervention in a policy process. Second, it indirectly stresses the explanatory value of the combinations identified in chapter 5 and 6. That is, when the opposition of the executive is combined with a passive legislature (chapter 5) or with social actors with low political leverage (chapter 6), then it is very likely that a policy dispute would become judicialized either because there are not other political venues open to the social actors involved in the dispute (chapter 5), or because these actors do not have political leverage to access and engage the government in policy negotiations (chapter 6).

Summing up, this study identifies three main combinations of conditions which drive the demand for judicialization of public policy in Argentina. In the first of these combinations, the involvement of the courts occurs in political scenarios characterized by a weak system of checks and balances between the executive and the legislature. In the second one, the judicialization of policy is triggered by the deficiencies of the state apparatus to properly implement and enforce policy commitments already made by the elected branches of government. Finally, in the third scenario, judicialization occurs in political contexts in which the social actors involved in a policy issue had limited access to the policymaking process and limited political leverage, and their claims faced a strong opposition from the executive. When facing any of these three contexts, my research shows that social actors posing claims to the state are likely to turn to the courts to pursue their policy goals.

THEORETICAL IMPLICATIONS

Beyond an analysis of the phenomenon of judicialization in Argentina, this study has important theoretical implications for our general understanding of the political factors driving the demands for judicial intervention in public policy.

In the first place, this research clearly demonstrates that the judicialization of policy disputes is a result of a much more complex political picture than the widespread notion of the policy loser portrays. The attempt to explain the demand for judicial involvement in public policy by just arguing that those who litigate is because they cannot attain their policy goals through the traditional political branches of government, clearly oversimplifies how democratic governance works, and how it is linked to the phenomenon of judicialization As I mentioned in a previous chapter, such a general explanation cannot tell us whether the losers' opinions and views could be heard in the policy process, or if the disputed policies were taken according to the proper rules of a democratic polity, or even if the government was effectively upholding the laws and regulations already in force. In sum, it cannot give us insights about the political factors that trigger the demand for judicial involvement in public policy.

Second, my research also shows that other alternative theoretical explanations developed by the specialized literature, namely the politically disadvantaged groups and the political fragmentation argument, may explain certain types of cases of judicialization, but not others. For instance, the political disadvantage argument was only fully reflected in one of the three political scenarios identified by this study as triggering policy litigation in Argentina. In the other two scenarios, the political leverage of the involved social actors was not a key condition driving the demand for judicial involvement. As I mentioned in a previous chapter, this is a finding of significant empirical and theoretical value given that observers and scholars tend to overstress the

relevance of under-represented actors when explaining the phenomenon of judicialization. This is an even more striking finding when one takes into account that the policy fields covered by this research involved populations that are historically disadvantaged social groups in Argentina like indigenous people, or suffer from structural problems of collective action like the cases of societal demands for consumer or environmental protection.

In its turn, the political fragmentation argument was not relevant at all to explain the judicialization of the public policy disputes covered by this study. The case studies largely confirm our expectation that legislative deadlocks or stalemates are not a key factor triggering the phenomenon of judicialization in Argentina. Indeed, most of the policy conflicts examined occurred in political contexts that could hardly be considered fragmented and in which the involved governments had policy making majorities or were potentially able to garner the legislative support they needed.

However, the limited empirical coverage of these theories (the political fragmentation and the politically disadvantaged groups) does not indicate that their causal arguments are invalid, but rather that they can explain only certain types of cases of policy judicialization. A key contribution of this dissertation is precisely to show that there are substantially different political scenarios under which public policy disputes are likely to become judicialized, and that the existing theoretical arguments can explain some of them, but not others.

In the third place, the results of this research validate my argument that scenarios of weak rule of law can trigger the judicialization of public policy. As I have already explained above, in these types of cases, judicialization results from the lack of enforcement or implementation of existing policy mandates due to deficiencies of the state apparatus, or to the opposition of the political elites in charge of the government to

uphold the rule of law and the passivity of the legislature to control the executive. From a theory building point of view, the conceptual formulation and empirical validation of these two sources of judicialization, are a main contribution of my research. In fact, the specialized literature has not really examined and discussed weak horizontal accountability and state deficiencies as factors driving the demand for judicial intervention in public policy. Moreover, these scenarios of weak rule of law explain certain types of cases of judicialization that the existing theoretical explanations cannot account for. As mentioned above, the literature on judicialization has largely tended to focus on disputes in which the actors turning to the courts are advocating changes in the existing normative framework.[403] However, as this study shows, the involvement of the courts in public policy processes is most of the time related to disputes regarding the implementation or enforcement of existing legislation. As Brinks and Gauri argue (2008), judicialization tends to follow legislative production, not to precede it. In this regard, my explanations about how state deficiencies and how situations of weak horizontal accountability affect the rule of law, driving the demand for judicial intervention, clearly fill a gap in the literature on judicialization.

Finally, my research strongly suggests that the study of the phenomenon of policy judicialization can greatly benefit from configurational analysis and typological theorizing. As mentioned above, a key contribution of this dissertation is precisely to show that there are substantially different political conditions or combinations of conditions triggering the involvement of the courts in policy disputes. Clearly, this fits perfectly with a typological theory approach, which is inherently open to the possibility of equifinality. As mentioned in a previous chapter, typological theorizing allows for identifying alternative types of combinations of causal conditions that are linked to the

[403] There are, of course, exceptions. See, for instance, Olson's work on litigation on the rights of disabled people (1984).

phenomenon under investigation. In this way, it also allows researchers to develop contingent generalizations about specific type of configurations (George and Bennett 2004).

In building a typological and configurational approach to the study of judicialization, my research makes an important contribution by specifying an initial list of theoretical conditions that can trigger the involvement of the courts in public policy (namely, a strict formulation of the policy loser argument, the political leverage of the social actors posing claims to the state, the role of the legislature, the role of the executive branch of government and the capability of the state apparatus). The identification and conceptualization of these conditions was partly based on the analysis and reformulation of the existing theories developed by the specialized literature on legal mobilization and judicial politics, and partly based on the empirical analysis of the cases covered by this study. These conditions, as a whole, constitute an analytical framework that allows researchers to analyze and assess how the different ways in which a democratic polity works can drive the demand for judicial intervention in policy issues. In fact, my research shows how these conditions, either individually or in combination, can account for different types of political scenarios that trigger the judicialization of public policy. Whether this framework covers all the possible political scenarios in which judicialization is likely to occur in democratic regimes, or whether are there other critical political factors that trigger the demand for judicial involvement in public policy, these are issues and questions open to further comparative research.

ABOUT THE ROLE OF JUDICIALIZATION IN DEMOCRATIC POLITICS

The results of this study also speak to the different types of roles that judicialization can play in a system of democratic governance. Does judicialization work

mainly as a *countermajoritarian* venue, as traditionally has been assumed by legal scholars and constitutional law theorists, protecting the interests of the minorities against the majorities? Or do judicial procedures act as *substitutes* for majoritarian politics, addressing policy issues which the political branches of government are unable or unwilling to resolve? Or rather does judicialization fulfill a *pro-majoritarian* role, monitoring state compliance and implementation of policies and laws approved through majoritarian institutions? Clearly these roles are not mutually exclusive. Courts can perform these alternative roles in different types of conflicts. Nevertheless, the mere exercise of posing these questions is valid because it makes us revisit our assumptions about what courts supposedly do and what they actually do.

In relation to the first question, my research shows only limited evidence of judicialization playing a countermajoritarian role in the policy disputes covered by this study. By a countermajoritarian role, I am basically referring to measures taken in the context of judicial procedures which are opposed to policy decisions made by the majoritarian policymaking institutions in a democratic regime. This countermajoritarian function of the judiciary is predicated on the idea that courts are the venues in which the minorities seek to protect their rights and interests against the will of the majorities, regardless of whether they are powerless and voiceless minorities (Ely 1980; Dworkin 1985), or strong and powerful ones (Hirschl 2004). The argument is clearly based upon the assumption that the minorities are the losers or the likely losers of democratic, majoritarian policymaking processes; that is the reason why they turn to the courts. Following the logic of this argument, then, it is not surprising that judicialization did not play a major countermajoritarian role in the cases examined by my study. The patterns of judicialization identified through my research clearly show that litigation, at least in the policy fields covered by the study, was not a result of policy losers turning to the courts.

A different issue is whether judicialization benefits politically disadvantaged actors. It is worth clarifying that here I am not referring to whether the substantive court decisions favor these actors, but rather whether the judicialization of the policy processes and policy negotiations benefits them. In this regard, my research shows that the involvement of the courts often increased the political leverage of this type of actors, giving them greater access and voice in the policy processes. The dispute about oil production in the Llancanelo wetlands (chapter 6) is one of the cases in which the access and leverage of the social groups changed most dramatically as a result of the intervention of the courts. Once the conflict became judicialized, the provincial government could not ignore the local environmental groups as a main actor in the policy process. The final negotiations between the provincial government, the oil company and the environmental groups to define the boundaries of the Llancanelo reserve (which were later approved by the provincial legislature) clearly speaks to the leverage gained by the NGOs as a result of the judicialization of the dispute. Another interesting example of this dynamic is the dispute about the renegotiation of the metropolitan train concessions (also see chapter 6). During the months the TBA's concession reform was judicially suspended, the government and the concessionaire attempted to reach a negotiated agreement with the consumer group that brought the legal claim to the courts. This was one of few instances (if not the only) in which the consumer groups were significantly involved in the process of re-negotiation of the train concessions. In sum, as these examples suggest, judicialization clearly plays a role in opening policy processes to politically weak social actors, who otherwise would not be fully considered as relevant stakeholders by the governments.[404]

[404] This, of course, raises a lot of other important questions and issues, such as the representativeness and the accountability of the specific associations and groups that gain access to a particular policy process as result of the involvement of the courts. In other words, to what extent can they be considered representative

A third issue to analyze is whether judicialization results in courts and judicial procedures acting as substitutes of majoritarian politics. Most of the literature on judicialization, explicitly or implicitly, assumes that the involvement of the courts is at the expense of the executive and the legislature. Tate and Vallinder's seminal work on judicialization (1995) stresses that the judicial displacement of the other branches of government is the distinguishing feature of this phenomenon. Based on this logic, many scholars have underlined how legislative inaction resulting from deadlocks and stalemates trigger judicial intervention in public policymaking (Clayton 1992; Tate 1995; Edelman 1995; Ferejohn 2002; Whittington 2005). In this type of contexts, in which the elected branches of government are blocked and inactive, courts and judicial procedures become the place where policy is made.

My research, however, does not provide much evidence of the courts acting as substitutes of majoritarian politics. This finding should not be surprising given that legislative deadlocks and stalemates were not a key factor in the judicialization of the policy disputes covered by this research. Furthermore, when facing legal cases with strong and broad policy implications, courts often tend to open and foster processes of negotiation among the parties involved in a dispute rather than to formulate a policy response by themselves. The case of CEAMSE and the Punta Lara landfill is a good example of this dynamic (see chapter 5). Facing a situation in which the landfill had to be closed, but there were no other places readily available to receive the waste, the Supreme Court of the province of Buenos Aires opened and led a very complex process of

---

of the broader, diffuse constituencies that are affected by the policy in question? to whom are they accountable for the "good" or "bad" policy consequences that may result from their actions? It is not the purpose of my study to address these issues, but at least I want to point out that when a court opens a space in the negotiating table for a specific association or group, the issue of the political and social legitimacy and representativeness of this type of actors becomes much more central.

negotiation between the company, the local groups and the provincial government with the purpose of designing a policy solution to the issue, which later was approved by the provincial legislature. Likewise, in the dispute about oil production in the Llancanelo wetlands (chapter 6), the courts stated that the government's authorizations to the oil drilling projects had to be based on the previous demarcation of the boundaries of the Llancanelo protected area. But the courts did not establish those limits by themselves (which was one of the main contentious issues in this case); instead, the provincial Supreme Court commanded the provincial government to achieve a negotiated agreement with the different stakeholders (this agreement was later approved by the provincial legislature). Clearly, the type of role played by courts and judicial procedures in these cases is quite distant from the traditional perception of judges as having the "last word" on a dispute. Moreover, these cases largely confirm Brinks and Gauri's argument (2008) that judicialization does not necessarily substitute for the policy debates and negotiations that might take place in the other branches of government. Instead, it adds another venue where the policy process might evolve, and injects new elements in the policy debate.

Finally, the last question to address is whether judicialization fulfills a pro-majoritarian role. While my research found little evidence of the court playing a countermajoritarian role or as substitute of democratic politics, its results largely support that idea that judicialization can work as a venue for majoritarian politics. In fact, in most of the disputes examined by my study, social actors turned to the judiciary to demand the enforcement or implementation of policy mandates and commitments acquired through majoritarian political processes, which the state was unwilling or unable to realize in practice. In this type of cases, as I explained before, judicialization usually worked as a fire alarm system, signalling deficits and gaps between the policy goals and mandates

expressed in the legislation, and their effective and concrete fulfillment in practice.[405] In conclusion, this predominant *"pro-majoritarian"* feature of the phenomenon of judicialization in the Argentine context is consistent with one the main arguments developed throughout this dissertation: the weakness of the rule of law, defined as the lack of enforcement and compliance with the existing rules, is one of the main sources -if not the main source- driving the involvement of the courts in public policy in Argentina.

[405] Clearly, our view of judicialization as avenue to achieve the goals and commitments made through democratic politics, substantially differs from the view that conceive the courts as agents of the ruling majority (for instance, Dahl 1957). In this view, the "majoritarian" feature of the courts is based on whether the courts rule for or against the policy preferences of the ruling political coalition. In such a view, the potential accountability function of the courts would not be considered "pro-majoritarian".

Appendix A: Interviews and Personal communications

Abramovich, Victor. Former Executive Director of *Centro de Estudios Legales y Sociales* (CELS). Interview, Buenos Aires, August 12, 2008.

Amaya, Jorge A. Consumer law expert. Personal communication. April 1, 2008.

Arauz, Mora. Member of *Fundación Ciudad*. Interview. Buenos Aires, June, 2004.**(*)**

Bianco, Mabel. Executive Director of *Fundación para el Estudio e Investigación de la Mujer* (FEIM); former Director of the HIV- AIDs program of the national Minister of Health. Interview. Buenos Aires, June 3, 2008.

Bianco, María ines. Lawyer specialized on health care issues. Interview, Buenos Aires, June 30, 2008.

Berstein, Horacio. Member of the *Unión de Usuarios y Consumidores*. Personal communication. August 2, 2008. Interviews. Buenos Aires, April 21, 2008 and August 14, 2008

Brailovsky, Antonio. Former Environmental Ombudsman of the city of Buenos Aires. Interview. Buenos Aires, July 7, 2004.**(*)**

Caplan, Ariel. Consumer law expert; former representative of the consumer associations in the *Comisión de Renegociación de Contratos*. Interview. Buenos Aires, April 8, 2008.

Carrasco, Morita. Antropologist; co-director of *Geaprona -Grupo de estudios en aboriginalidad, provincias y nación-*. Interview. Buenos Aires, May 23, 2008.

Di Paola, Maria Eugenia. Executive Director of *Fundación Ambiente y Recursos Naturales* (FARN). Interview. Buenos Aires, June 5, 2008.

Enria, Delia. Director of *Instituto Nacional de Enfermedades Virales Humanas "Dr. Julio I. Maiztegui"* Phone interview. October 1, 2008.

Ferreira, Isabel. 2008. Interview. Ombusdamn office of the City of Buenos Aires. Buenos Aires , August 15, 2008.

Frieder, Kurt. 2008. Executive Director of *Fundación Huesped*. Interview. Buenos Aires, June 3, 2008.

Gerosa Lewis. Ricardo. Lawyer and member of Assembly of Self –convened Neighbors Against the Mine from Esquel. Phone interview. November 31, 2008.

Hiquis, Jorge. President *Sociedad de Fomento del Dock Sud*. Interview. July 20, 2004.**(*)**

Julia, Marta. Personal communication. Environmental law and policy expert; former Director of the Environmental Agency of the province of Cordoba. Personal communication. February 9, 2008.

Kaplun, Santiago. Legal attorney of the plaintiffs in the Mendoza case (Riachuelo). Interview, Buenos Aires, April 16, 2008.

Kravetz, Diego. Legislator of the City of Buenos Aires. Interview. Buenos Aires. Buenos Aires, May 23, 2008.

Lowenrosen, Flavio. Consumer law expert. Interview. Buenos Aires, April 22, 2008.

Napoli, Andrés. Director of the Citizen Control program of FARN. Personal communication, October 16, 2007. Interview. Buenos Aires, May 10, 2008.

Maiztegui, Cristina. National Ombudsman office. Buenos Aires. Interview. April 22, 2008.

Malagamba, Luis. Provincial Senator of the province of Buenos Aires; former ombudsman of the city of La Plata. Interview, La Plata, July 21, 2008.

Marcelo Martinez. Member of *Asociación Nuevo Ambiente*; former member of city council of Ensenada. Interview. Ciudad de La Plata, May 7, 2008.

Molero, Pablo. Coordinator of FOROPRO . Phone interview. September 13, 2008

Odriazola, Veronica. Director of the pollution control program; Greenpeace Argentina. Interview, Buenos Aires, July 14, 2004.**(*)**

Polino, Hector. National deputy; founder of *Consumidores Libres*. Interview. Buenos Aires, June 9, 2008.

Prieto, Martin. 2007. Executive Director of Greenpeace Argentina. Personal communication. November 12, 2007.

Roca, Agustina. Former technical advisor of the indigenous association *Warmis Sayajsunqo* (Jujuy). Interview. Buenos Aires, May, 2008. Phone interview, November 4, 2008.

Rodriguez Salas, Aldo. Environmental law and policy expert; former secretary of environment of the province of Mendoza. Personal communication. January 9, 2008.

Sosa, Eduardo Sosa. Executive Director of *OIKOS Red Ambiental*. Interview. Buenos Aires, April 14, 2008.

Viñas, Adriana. National ombudsman office. Interview. Buenos Aires, July 10, 2008.

Walsh, Juan Rodrigo. Environmental law and policy expert; former Environmental Secretary of the City of Buenos Aires. Personal communication. November 5, 2007.

Yasseff, Amilcar. Lawyer specialized on health care litigation. Interview. July 25, 2008.

(*)These interviews were part of a summer field research on a project on experiences of social accountability in the Matanza – Riachuelo basin (Argentina) that I carried out during June- August 2004.

Appendix B: Case Selection

Consumer and Environment

In the first stage of my research, I focused on identifying the disputes related to environmental policy and consumer protection issues. A main reason for prioritizing these two policy fields was that I already had contacts with, and access to, experts and activists working on these issues in Argentina

I contacted, then, five experts working on environmental policy, and three working on consumer protection issues.[406] In both policy fields, there was strong agreement among the experts about the relevance of certain cases. In fact, there were a couple of cases that were cited by all or most of the interviewees in each policy field. Of course, these disputes were selected for this study. Beyond these cases, the disputes identified by the experts varied quite significantly. Therefore, among the cases that were cited by some but not all of the experts, I selected those which provided more variance to the pool of conflicts in terms of policy issues, jurisdictions and/or governments involved.

This is the list of the policy disputes selected regarding environmental issues: 1) environmental pollution in the Matanza - Riachuelo basin; 2) oil drilling in the Llancanelo wetlands in Mendoza; 3) CEAMSE's waste disposal policy in the Punta Lara landfill.

This is the list of disputes selected regarding consumer protection issues: 1) the re-structuring of phone tariffs during the Menem administration; 2) the re-negotiation of the metropolitan train concessions during the 1990s; 3) the re-negotiation of the public utilities concessions during the Duhalde government.

[406] In this appendix, I use the term expert in a broad sense, to refer to individuals deeply involved in a certain policy field. It includes individuals that have a technical or academic degree in relation to the policy issues under analysis, and also activists who might not have academic or professional training, but have a first - hand knowledge of that policy field.

Health Care

In the case of environmental policy and consumer protection, there were clear "epistemological communities" in Argentina (that is, networks of policy experts, NGOs, etc., working on these policy fields). However, in the case of health care, it was very difficult to identify such a defined community. There were clearly identifiable networks of institutions working on specific health policy issues (HIV, cancer, etc.), but not on health care policy in general. Therefore, in relation to this policy field, the selection of cases was based mainly on specialized literature, and only secondarily, on expert opinion. Basically, I identified a small number of legal cases which were repeatedly cited by: i) CELS's annual reports on human rights in Argentina.[407] ii) Other well known papers and publications dealing with health care litigation in Argentina, such as Bergallo (2005), Maurino, Nino and Sigal (2005), Abramovich and Courtis (2006). Moreover, I interviewed 3 experts in health care litigation in order to confirm the relevance of the cases selected and to ask for suggestions about other cases.

Based on these sources, this is the list of policy disputes selected in relation to health care policy: 1) the provision of treatment and medicines to people living with HIV-AIDS during the 1990's; 2) the production of the vaccine against the Argentine hemorrhagic fever or *"mal de los rastrojos"*.

Indigenous People

In comparison with the environment and consumer policy fields, I did not have previous knowledge or contact with experts or institutions working on indigenous

[407] CELS *(Centro de Estudios Legales y sociales)* is one the most prestigious advocacy organization working on human right issues in Argentina, with a special focus on litigation. Since 1997-1998, CELS has published this report almost every year. A section of the report deals with socio-economic rights, and usually there is a chapter dealing with health care issues (reports are available at http://www.cels.org.ar/documentos/).

people's issues. Therefore, my procedure for identifying relevant judicialized disputes in this field was not as neat as in the case of environment and consumer protection. The selection of cases was based mainly on interviews with three experts on indigenous policy issues, which I contacted using the "snowball" method. It is worth noting that each of these experts was directly involved in a specific policy dispute, and my first contact with each of them was in relation to that dispute. In parallel, I used specialized literature to confirm the policy relevance of the cases in which these experts were involved. Mainly, I referred to the 2003 report prepared and submitted by the catholic agency on indigenous issues to the International Labor Organization (ILO) regarding the status of Convention 169 in Argentina (ENDEPA and MEDH 2003).[408] This report provides a detailed description of the main policy disputes and rights violations affecting indigenous communities in Argentina. Moreover, in selecting the cases I took into account that they occurred in different provinces, and involved different social actors and governments.

This is the list of the policy disputes selected regarding indigenous people: 1) indigenous communal land rights in Salta (the Lhaka Honhat case); 2) the land tenure program for indigenous communities in Jujuy; 2) the 2007 health and food emergency affecting the indigenous communities in Chaco.[409]

Negative cases

Conceptualizing and identifying relevant negative cases for this study was a challenging process. Following Mahoney and Goertz (2004) and Ragin (2004), a

[408] The ILO Convention 169 is an international agreement concerning the rights of indigenous people that was adopted in 1989. Argentina ratified the convention on 2000.

[409] Given that this case occurred in 2007, it was obviously not listed in the 2003 report submitted to the ILO. A main reason for selecting the case about health care and food emergency in the Chaco was that the policy issue involved was not land tenure rights, which was the issue addressed in the two other cases.

relevant negative case is basically a case (policy dispute) in which the outcome (judicialization) is absent although it might be possible. Consequently, an **irrelevant** negative case is a case (policy dispute) in which the outcome (judicialization) is not possible because basic conditions for such outcome to occur are not present in the first place. In the context of this study, then, I conceptualize a relevant negative case as a non-judicialized policy conflict in which: i) societal policy demands are not answered or even addressed by the government (government is unresponsive),[410] and ii) the conditions enabling judicialization are present (a favorable legal framework, a relatively autonomous judiciary and certain level of organizational support).

During field research I identified many instances of non-judicialized policy conflicts in which the government was unresponsive. However, I observed that the lack of judicialization was basically due to the absence of one or more of the enabling conditions for judicialization. For instance, a common situation was that the social actors demanding policy changes lacked proper legal standing or did not have sufficient legal bases to bring claims to the courts, and when they did bring legal claims, their claims were rejected in limine by the courts. These types of non-judicialized cases were relevant for assessing, for example, whether a proper legal framework is a necessary enabling condition for judicialization to occur; but they were irrelevant to analyze under which political conditions policy judicialization is likely to occur –which is the purpose of this study-, because the lack of judicialization was due to the absence of one of the enabling conditions in the first place.

However, as I advanced in my field research, I also began to observe cases of policy conflicts in which the actors filed legal claims in the courts, and these claims were declared admissible, but then the courts and judicial procedures did not become a main

[410] Clearly, if the government answered the societal demands about a policy issue, the actors have no reason to bring a legal claim to the courts.

venue in which the policy process and debate evolved. In other words, these were cases in which there were claims filed at the courts, but the policy processes were not really or fully judicialized according to the concept of policy judicialization used in this research.[411] Moreover, these cases clearly fell within the scope conditions of this research, and hence, constituted 'relevant' negative cases for this study.

Through interviews and analysis of documental data, I identified two of this type of cases, which I labeled cases of weak judicialization: 1) the health care reform for disabled people promoted by the national government in 2002; 2) mining policy in the province of Chubut (the Esquel case).[412]

[411] See the analysis of the concept of policy judicialization developed in chapter 1.

[412] The case of Esquel was mentioned by most environmental experts as a relevant policy dispute in which the courts got involved. However, after a close analysis of the data I concluded that, although the courts were involved, the policy process was not significantly judicialized.

Appendix C: The fs-QCA Process of Minimization

This appendix describes how the process of Boolean minimization was carried out. As stated in chapter 2, I use the computer program fs-QCA 2.0 to perform it.[413] The basic, "raw" material for the minimization process is the truth table (table 8) described in chapter 2. The table indicates that there are eight configurations in which policy disputes became judicialized [1 outcome], corresponding to eleven cases, and two configurations in which judicialization was weak [0 outcome], corresponding to two cases. As is a standard practice in QCA analysis, the minimization of the [1] configurations and the [0] configurations should be done separately (Rihoux and De Meur 2009). The appendix, however, only explains how I performed the process of minimization of the [1] configurations. The minimization of the [0] configurations was a very simple procedure (it only encompassed two configurations that differed on only one condition) and is already explained in chapter 2.

Just to remind the reader, the most fundamental rule in the process of Boolean minimization is very simple: if two Boolean expressions differ in only one causal condition but share the same outcome, then that causal condition can be considered superfluous and it can be removed from the original expressions, creating a shorter and more parsimonious combined expression (Ragin 2008). At this point, it is important to mention that when performing the minimization process, the computer software does not recognize cases but the configurations specified in the truth table. After the minimization is done, it is possible to connect each of the cases to the minimal formula obtained.

[413] The program can be downloaded from: http://www.u.arizona.edu/~cragin/fsQCA/software.shtml.

Minimization of the [1] configuration without logical remainders (complex solution)

Once the truth table is constructed, I minimize the [1] configurations using the software and without including any non-observed or counterfactual cases. This is the more complex solution resulting from the minimization process. It is composed by four basic configurations linked to the outcome, judicialization:[414]

Policy loser * Legislative passiveness *Executive opposition* DEF STATE CAP +

Pol loser * LEG PASS * EXE OPP * Deficient state capacity +

WEAK POLITICAL LEVERAGE * EXE OPP * Def state cap +

Pol loser * WEAK POL LEV * LEG PASS * EXE OPPO ⟶ JUDICIALIZATION

As mentioned above, this minimal formula is still quite complex. To achieve a more parsimonious result, I need to assess the possibility of making some simplifying assumptions and including logical remainders (counterfactuals).[415]

Minimization of the [1] configuration with logical remainders (intermediate solution)

It is worth remembering that QCA assesses the presence as well as the absence of the different causal conditions. Therefore, in order to achieve more parsimony, the

[414]In Boolean language, uppercase indicates 'positive" values or presence and lowercase indicates "negative" values or absence. Furthermore, the symbol * indicates the logical AND, and the symbol + indicates the logical OR.

[415] In the language of QCA, logical remainders are basically those combinations of causal conditions that lack empirical cases (Ragin and Sonnett 2004, 6). As I explained in chapter 2, my QCA analysis is based on five causal conditions; therefore there are 32 logically possible causal combinations. Only 10 of those 32 possible combinations have empirical cases. These 22 combinations left are the logical remainders. Any of these remainders is a potential counterfactual case.
In its turn, a simplifying assumption is an assumption made on the outcome value of a logical remainder, so it can be included in the minimization procedure (Rihoux and Ragin 2009, 183).

software allows the researcher to define whether a condition should contribute to the outcome only when present or only when absent, or both (See Ragin 2008). Based on my knowledge of the cases, then, I assume that only the presence of DEFICIENT STATE CAPACITY may be linked to the outcome, not its absence. In other words, I assume that only a deficient state apparatus may contribute to the judicialization of a policy issue. On the contrary, when the state is capable to intervene in a policy matter, and therefore it is capable to implement and enforce the relevant policies, that condition is rather irrelevant in explaining judicialization. In sum, based on my knowledge of the cases, I eliminate the *absence* of the condition "deficient state capacity" from the configurations linked to the outcome, and in that way, I was able to obtain a simpler minimal formula.

After performing the minimization, the resulting minimal formula consists of just three causal configurations. This is what the software refers to as the "intermediate" formula because it has incorporated an easy counterfactual and assumption, based on our knowledge of the cases. These are the three configurations formalized with a Boolean notation:

Policy loser * Legislative passiveness *Executive opposition* DEF STATE CAP +
(cases covered: FHA; Chaco; HIV-AIDS)

Pol loser * LEG PASS * EXE OPP +
(cases covered: Ceamse; Jujuy; Tariffs; Salta; Riachuelo)

WEAK POLITICAL LEVERAGE * EXE OPP $\longrightarrow$ JUDICIALIZATION
(cases covered: Phone, Llancanelo, Trains, Riachuelo, Salta)

As the reader might already realize, there are two cases (Salta and Riachuelo) which are covered by two different configurations. This is not an unusual situation in QCA analysis, given that the computer software does not perform the minimization

process based on the cases but on the causal configurations specified in the truth table (See Rihoux and De Meur 2009) . Therefore, when there is a situation like this one in which, as a result of the process of minimization, a case is covered by two different configurations, it is up to the researcher to make a choice based on his/her knowledge of the cases and to place the case under one of the alternative configurations. Accordingly, in the context of this study, I first assessed –based on my knowledge of the cases- which of the two alternative configurations better reflected the political scenario under which each of these policy disputes became judicialized. Then, I decided to place the Salta case in the second configuration, together with Ceamse, Jujuy and Tariffs, and I decided to place Riachuelo in the last configuration, together with Phone, Llancanelo and Trains.

Further minimization of the [1] configuration with logical remainders (parsimonious solution)

Finally, the software can further minimize the configurations by incorporating any logical remainder (counterfactual) that helps generate a logically simpler formula. This is what the software refers as the "parsimonious" solution. However, I do not consider this solution for mainly two main reasons. First, the threshold of admissibility for counterfactuals used in this stage is too low, which raises enormous doubts about the internal and external empirical validity of the results. Second, in the quest for parsimonious results, this solution does not allow for an analysis of the conditions as part of political scenarios in which judicialization is likely to occur. In other words, it loses the configurational approach which is one of the main benefits and advantages of using QCA analysis.

References

Abramovich, Víctor, and Christian Courtis. 2002. *Los Derechos Sociales como Derechos Exigibles*. Madrid: Trotta.

———. 2006. *El Umbral de la Ciudadania. el significado de los derechos sociales en el Estado social constitucional*. Buenos Aires: Editorial Del Puerto.

Acta Acuerdo entre el Instituto del Aborigen Chaqueño y el Poder Ejecutivo de la Provincia del Chaco, Agosto 23, 2006.

Agüero, Felipe. 1998. "Conflicting Assessments of Democratization: Exploring the Fault Lines." In *Fault Lines of Democracy in Post-Transition Latin America*, ed. F. Agüero and J. Stark. Coral Gables: North-South Center Press a the University of Miami.

"Andrada de Quispe y otros c/ Estado Provincial. Acción de Amparo. Expte. Nro. 8-105.437/03." 2006. Tribunal Contencioso Administrativo de la Provincia de Jujuy.

Arantes, Rogério B. 2005. "Constitutionalism, the expansion of Justice and the Judicialization of Politics in Brazil." In *The Judicialization of Politics in Latin America*, ed. R. Sieder, L. Schjolden and A. Angell. New York: Palgrave Macmillian.

"Asociación Benghalensis y otros c/Ministerio de Salud y Acción Social -Estado Nacional s/amparo ley 16.986 ". 2001. Corte Suprema de Justicia de la Nación.

"Asociación Civil Nuevo Ambiente - Centro Vecinal Punta Lara c/ CEAMSE -Recurso Extraordinario de Inaplicabilidad de Ley- Letra A 68857." 2006. Suprema Corte de Justicia de la Provincia de Buenos Aires.

"Asociación Civil Nuevo Ambiente CEN. VEC. P. Lara c/ CEAMSE S.A./ Amparo - Expte 4559." 2006. Juzgado de Primera Instancia en lo Contencioso Administrativo Nro. 1.

"Asociación de Comunidades Aborigenes Lhaka Honhat c/ Poder Ejecutivo de la provincia de Salta -Recurso de Hecho." 2004. Corte Suprema de Justicia de la Nación.

"Asociación OIKOS Red Ambiental c/ Gobierno de la Provincia de Mendoza p/ Acción de Amparo. Expte. 80.866." 2003. 15 Juzgado Civil, Comercial y Minas, de la Primera Circunscripcion Judicial de la Provincia de Mendoza.

Auditoria General de la Nación. *Estudio Especial del Contrato de Concesión del servicio de transporte ferroviario de pasajeros celebrado con Trenes de Buenos Aires S.A.* AGN, September 2002 [cited. Available from http://www.agn.gov.ar/informes/informesPDF2002/2002_092.pdf.

———. 2006. "Cuenca Matanza Riachuelo. Documento de Difusión." Buenos Aires.

Azpiazu, Daniel. 2002. *Las Privatizaciones en Argentina. Diagnostico y propuestas para una mayor competitividad y equidad social*. Buenos Aires: Fundación Osde - CIEPP.

Bergallo, Paola. 2005. "Justice and Experimentalism: Judicial Remedies in Public Law Litigation in Argentina." In *SELA Conference 2005*. Rio de Janeiro, Brazil.

———. 2010. "Individual right to health claims in Argentina: Are courts really making a difference?". Buenos Aires.

Beyers, Jan. 2004. "Voice and Access. Political Practices of European Interest Associations." *European Union Politics* 5 (2):211-40.

Bianco, Mabel. 2006. "Del mundo no gubernamental al gubernamental. Idas y vueltas." In *Activistas e Intelectuales de Sociedad Civil en la Función Pública en América Latina*, ed. C. B. Iglesias. Buenos Aires: CEDES.

Bianco, Mabel, Laura Pagani, María Ines Re, and Cecilia Correa. 2003. "Un Enfoque Cultural de la Prevención y la Atención del VIH/SIDA." In *Estudios e Enformes Serie Especial No. 18*: UNESCO.

Bianco, Mabel, María Inés Re, Laura Pagana, and Stella Barone. 1999. *Human Rights and access to treatment for HIV/AIDS in Argentina*. Edited by LACCASO. Buenos Aires.

Brinks, Daniel. 2005. "Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium." *Texas International Law Journal* 40 (3):595-622.

Brinks, Daniel M., and Varun Gauri. 2008. "A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World." In *Courting Social Justice. Judicial Enforcement of Social and Economics Rights in the Developing World*, ed. V. Gauri and D. M. Brinks. New York: Cambridge University Press.

Business for Social Responsability. 2003. "Informe de Minera El Desquite, Esquel, Argentina." San Francisco: CA.

Cámara de Diputados de la Nación Argentina. 2002. *Diario de Sesiones de la Honorable Cámara de Diputados de la Nación Argentina*. 13a. Sesión Ordinaria; item 4230-D-02. August 28, 2002.

Cámara de Diputados de la Nación Argentina, Secretaría Parlamentaria, Dirección de Información Parlamentaria. "Base de Proyectos 1990-1998." http://www.diputados.gov.ar/.

———. "Proyectos Presentados en Ambas Cámaras Desde 1 de Marzo de 1999." http://www.diputados.gov.ar/

Cámara de Diputados de la Provincia de Buenos Aires. 2006. *Diario de Sesiones de la Cámara de Diputados de la Provincia de Buenos Aires*. 134, 1 extraordinaria. December 7.

Cámara de Diputados de la Provincia de Buenos Aires. 2004. *Diario de Sesiones de la Cámara de Diputados de la Provincia de Buenos Aires*. 132, 24. December 22.

Cámara de Diputados de la Provincia del Chaco. 2007 (a). *Versión Taquigráfica de las Sesiones de la Cámara de Diputados*. Sesión Ordinaria Nro.14. June 6, 2007.

Cámara de Diputados de la Provincia del Chaco. 2007 (b). *Versión Taquigráfica de las Sesiones de la Cámara de Diputados*. Sesión Ordinaria Nro. 15. June 13, 2007.

Cámara de Diputados de la Provincia del Chaco. 2007 (c). *Versión Taquigráfica de las Sesiones de la Cámara de Diputados*. Sesión Ordinaria Nro. 17. June 27, 2007.

Cámara de Diputados de la Provincia de Mendoza. "Consulta de Proyectos." http://www.hcdmza.gov.ar//index.php?option=com_wrapper&Itemid=38.

"Cámara de Industria, Comercio y Producción de Puerto Madryn v. Estado nacional s/ medida cautelar." 1997. Juzgado Federal de Rawson.

Cámara de Senadores de la Provincia de Mendoza. "Sistema de Consulta Legislativa." http://www.senadomza.gov.ar:8080/exptes/consulta_exptes.php.

"Caplan, Ariel Orlando c/EN - Ministerio de Economía - Res. 20/02. Medida cautelar (Expte 127.160/2002)." 2002.

Carrasco, Morita, and Claudia Briones. 1996. *La Tierra Que Nos Quitaron*. Copenhague: Grupo International de Trabajo sobre Asuntos Indígenas (IWGIA)

Carrasco, Morita, and Silvina Zimerman. 2006. "Argentina: El caso Lhaka Honhat." Copenhague: Grupo Internacional de Trabajo sobre Asuntos Indígenas (IWGIA).

CEAMSE. http://www.ceamse.gov.ar/abre-home.html [cited March 30, 2010.

———. "Estatuto Social del CEAMSE." http://www.ceamse.gov.ar/abre-home.html.

Centro de Estudios Legales y Sociales -CELS. 2001. *Derechos Humanos en Argentina. Informe Anual 2001*. Buenos Aires: EUDEBA.

Centro de Estudios Legales y Sociales. 2001. *Derechos Humanos en Argentina. Informe Anual 2001*. Buenos Aires: EUDEBA.

———. 2008. *La Lucha por el derecho. Litigio estratégico y derechos humanos*. Buenos Aires: Siglo XXI.

Cerro, Mónica Teresita del. 2007. "Fiebre Hemorrágica Argentina (FHA). Un Logro: Una vacuna Argentina para un mal Argentino." In *Estrucplan on line*. Buenos Aires.

Chavez, Rebecca Bill. 2003. "The Construction of the Rule of Law in Argentina: A Tale of Two Provinces." *Comparative Politics* 35 (4; July):417-37.

———. 2004. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford, CA: Stanford University Press.

Chavez, Rebecca Bill, John A. Ferejhon, and Barry R. Weingast. 2011. "A Theory of the Politically Independent Judiciary: A Comparative Study of the United States and Argentina." In *Courts in Latin America*, ed. G. G. Helmke and J. Ríos Figueroa. New York: Cambridge University Press.

CIPPEC. *Directorio de ONGs Vinculadas a la Política Pública*, December 10, 2010 [cited. Available from http://www.directoriodeongs.org/index.php.

Clayton, Cornell W. 1992. *The Politics of Justice: The Attorney General and the Making of Legal Policy*. Armonk, New York: M.E. Sharpe.

———. 2002. "The Supply and Demand Sides of Judicial Policy-Making (or, Why Be So Positvie About the judicialization of Politics?)." *Law and Contemporary Problems* 65 (3):69-85.

Comisión Bicameral de seguimiento de las facultades delegadas al Poder Ejecutivo Nacional - Ley 25.561. 2003. "Reglamento de la Comisión Bicameral de seguimiento de las facultades delegadas al Poder Ejecutivo Nacional - Ley 25.561."

Comisión de Participación Indígena. *Parte de Prensa de la CPI del Programa de Tierras de Jujuy* March 26, 2004 [cited. Available from http://argentina.indymedia.org/news/2004/03/185730.php.

CONADIS. http://www.cndisc.gov.ar/doc_publicar/spb.htm [cited October 10, 2008.

"Consumidores Libres Coop. Ltda. y otro v. Estado nacional -Presidencia de la Nación- y otro s/sumarísimo." 1997. Juzgado Nacional en lo Contencioso-Administrativo Nro. 11 de la Capital Federal.

"Consumidores Libres y Otros c/ Estado Nacional –MOSP – Dto 210 s/Proceso de Conocimiento (Expte 9610/99)." 1999. Juzgado Nacional de 1ra. Instancia en lo contencioso Administrativo Federal Nro 4.

Cortner, Richard C. 1968. "Strategies and Tactics of Litigants in Constitutional Cases." *Journal of Public Law* 17:287-307.

Cox, Gary W., and Scott Morgenstern. 2002. "Latin America's Reactive Assemblies and Proactive Presidents." In *The Legislative Politics in Latin America*, ed. S. Morgenstern and B. Nacif. Cambridge: Cambridge University Press.

Cross, Frank B. 2001. "The Error of Positive Rights." *UCLA Law Review* 48:857-924.

Dahl, Robert. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker." *Journal of Public Law* 6:279-95.

De Meur, Gisele, Benoit Rihoux, and Sakura Yamasaki. 2009. "Addressing the Critiques of QCA." In *Configurational Comparative Methods: Qualitative Comparative Analysis (QCA) and related techniques*, ed. B. Rihoux and C. Ragin. Thousand Oaks, California: SAGE Publications.

Defensor del Pueblo de La Nación. 1999. "Sexto Informe Anual -1999-." Buenos Aires: Defensor del Pueblo de la Nación.

———. 2003. "Informe Especial sobre la Cuenca Matanza Riachuelo."

———. 2005. "Informe Especial de Seguimiento sobre la Cuenca Matanza Riachuelo (2003 / 2005)." Buenos Aires.

"Defensor del Pueblo de la Nación c/ EN PEN - Dec 120/03 s/proceso de conocimiento - incidente medida cautelar (causa 369/2003)." 2003.

"Defensor del Pueblo de la Nación c/ Estado Nacional y otra (Provincia del Chaco) s/ proceso de conocimiento (D.587.XLIII)." 2007. Suprema Corte de la Justicia de la Nación.

"Defensor del Pueblo de La Nación c/ Estado Nacional y otros (expte. 9845/99)." 1999. Juzgado Nacional de 1ra. Instancia Contencioso Administrativo Nro. 11, Secretaria 21.

"Defensor del Pueblo de la Nación v. Poder Ejecutivo nacional (Ministerio de Economía y Servicios Públicos) s/ amparo." 1997. Juzgado Contencioso-Administrativo Federal Nro. 9 de la Capital Federal.

"Defensoria del Pueblo de la Ciudad de Buenos Aires c/ Ministerio de Economia." 2003. In *La Ley, 2003 -C*: Juzgado Federal Contenciosoadministrativo Nro. 12.

Defensoría del Pueblo de la Nación. 2008. "Informe Preliminar. Corte Suprema de La Nación. Audiencia del 30 de Abril de 2008."

"Defensoria del Pueblo de la Nación c/ Estado Nacional. Amparo (expte. 17521/98)." 1998.

"Defensoria del Pueblo de la Nación c/ Poder Ejecutivo Nacional." 2002. In *La Ley*: Juzgando federal de 1ra. Instancia en lo contencioso administrativo Nro. 5.

Dworkin, Ronald. 1985. *A Matter of Principle*. Cambridge, MA: Harvard University Press.

Edelman, Martin. 1995. "Israel." In *The Global Expansion of Judicial Power*, ed. C. N. Tate and T. Vallinder. New York: New York University Press.

Ely, John H. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Equipo Nacional de Pastoral Aborigen de la Republica Argentina (ENDEPA), and Movimiento Ecuménico por los Derechos Humanos (MEDH). 2003. "Informe Alternativo sobre el Cumplimiento del Estado Argentino a las Obligaciones Asumidas por la Ratificación del Convenio Número 169 de la OIT Relativo a Pueblos Indígenas y Tribales en Países Independientes." Resistencia, Chaco.

Esquivel, Maria Laura, and Cecilia Figari. 2006. "El Sistema Unico de Prestaciones Básicas para las Personas con Discapacidad." In *La Discapacidad en Argentina: Un diagnóstico de situación y políticas públicas vigentes a 2005*, ed. F. Par. Buenos Aires.

Fairstein, Carolina, and Silvina Zimermam. 2005. "El derecho a la salud en la lucha contra el VIH-SIDA. Un examen de la política pública y los recursos presupuestarios." Buenos Aires: CELS.

FARN. *Área Riachuelo. Cuerpo Colegiado* [cited. Available from http://www.farn.org.ar/riachuelo/cuerpo_colegiado.html.

Felder, Ruth. 2001. "La Privatización y Regulación de los Ferrocarriles en Argentina. La dimensión de lo político en las políticas de reestructuración del sector." *Gestión y Política Pública* X (1):145-81.

"Fendin y otros c/PEN-dto. 486/02 s/amparo ley 16.986." 2002. Juzgado Federal Contencioso Administrativo Nro. 3.

Ferejohn, John. 2002. "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65 (3):41-68.

Fundación Ciudad. 2002. "Foro Desarrollo Sostenible de la Cuenca Matanza Riachuelo. Guía de Trabajo." Buenos Aires.

Fundación Dr. Julio Maiztegui para el Desarrollo Científico y Tecnológico Regional. *Historia de la Fundación Maiztegui* [cited February 4, 2010. Available from http://www.fundacionmaiztegui.org.ar/800x600/Marcos/Total.htm.

Fundación Metropolitana. 2004. "La Gestión: Cómo se administran los recursos." *La Gran Ciudad* (4).

Galanter, Marc. 1974. "Why the Haves Come Out Ahead: Speculations of the Limits of Social Change." *Law & Society Review* 9:95-160.

Gauri, Varun, and Daniel Brinks, eds. 2008. *Courting Social Justice. Judicial enforcement of social and economic rights in the development world*. New York: Cambridge University Press.

George, Alexander , and Andrew Bennett. 2004. *Case Studies and Theory Development in the Social Sciences*. Cambridge: MIT Press.

Gerosa Lewis, Ricardo Tomás. 2003. *La Protección Jurídica del Medio Ambiente en la Provincia de Chubut*. Esquel: Chubut: Imprenta FB.

———. 2002. "¿Son aplicables las leyes provinciales a la actividad minera?" *Diario El Oeste*:2.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional courts in Asian cases*. Cambridge: Cambridge University Press.

Gloppen, Siri. 2006. "Courts and Social Transformation: An Analitical Framework." In *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor*, ed. R. Gargarella, P. Domingo and T. Roux. Aldershot, Hampshire, England: Ashgate.

González Morales, Felipe, ed. 1997. *Las Acciones de Interés Público: Argentina, Chile, Colombia y Perú*. Santiago de Chile: Escuela de Derecho de la Universidad Diego Portales.

Graber, Mark A. 1993. "The Nonmajoritarian Difficulty - Legislative Deference To The Judiciary." *Studies in American Political Development* 7 (Spring):35-73.

Handler, Joel F. 1978. *Social Movements and The Legal System. A Theory of Law Reform and Social Change*. New York: Academic Press.

Hirschl, Ran. 2004. *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*. Cambridge, Massachusetts: Harvard University Press.

Hoffmann, Florian F., and Fernando R. N. M. Bentes. 2008. "Accountability for Social and Economics Rights in Brazil." In *Courting Social Justice. Judicial Enforcement of Social Economics Rights in the Development World*, ed. V. Gauri and D. M. Brinks. New York: Cambridge University Press.

Honorable Senado de la Nación Argentina. "Actividad en el Senado." http://www.senado.gov.ar/web/proyectos/cuerpo1.php.

Horowitz, Donald. 1977. *The Courts and Social Policy*. Washington DC: : The Brookings Institution.

Iaryczower, Matías, Pablo T. Spiller, and Mariano Tommasi. 2002. "Judicial Independece in Unstable Environments, Argentina, 1935-1998." *American Journal of Political Science* 46 (6):699-716.

Instituto Nacional de Enfermedades Virales Humanas "Dr. Julio Maiztegui" -INEVH-. *Un Poco de Historia* [cited February 4, 2010. Available from http://www.fundacionmaiztegui.org.ar/1024x768/Marcos/INEVH/Marcos/Total.htm.

Inter-American Commission on Human Rights *What is the IACHR?* [cited. Available from http://www.cidh.org/what.htm.

Kagan, Robert. 2001. *Adversarial Legalism. The American Way of Law*. Cambridge: Harvard University Press.

Kapiszewski, Diana, and Matthew M. Taylor. 2008. "Doing Courts Justice? Studying Judicial Politics in Latin America." *Perspective on Politics* 6 (741-767).

"Kattan, Alberto E. y otro c/ Gobierno Nacional -Poder Ejecutivo." 1983. In *LA LEY*: Juzgado Nacional de 1a Instancia en lo Contencioso-administrativo Federal Nro. 2.

Lanzetta, Máximo, and Néstor Spósito. 2003. "Proceso Apell Dock Sud." Buenos Aires: PAI/CIPRA/GTZ. Not published.

Legislatura de la Provincia de Chubut. 2002. *Diario de Sesiones de la Honorable Legislatura de Chubut*. November 26.

Legislatura de la Provincia de Chubut. 2003. *Diario de Sesiones de la Honorable Legislatura de Chubut*. Sesión 887. March 25.

López, Andrea, and Ruth Felder. 1997. "Nuevas Relaciones entre el Estado y los Usuarios de Servicios Públicos en la Postprivatización." In *Serie II Estado y Sociedad*. Buenos Aires: Instituto Nacional de la Administración Pública.

Mahoney, James. 2004. "Comparative Historical Methodology." *Annual Review of Sociology* 30:81-101.

Mahoney, James , and Gary Goertz. 2004. "The Possibility Principle: Choosing Negative Cases in comparative Research." *American Political Science Review* 98 (November):653-69.

Mahoney, James, and Gary Goertz. 2006. "A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research." *Political Analysis* 14:227-49.

Mainwaring, Scott. 2006. "State Deficiencies, Party Competition, and Confidence in Democratic Representation in the Andes." In *The Crisis of Democratic Representation in the Andes*, ed. S. Mainwaring, A. M. Bejarano and E. Pizarro Leongómez. Stanford, California: Stanford University Press.

Mainwaring, Scott, Timothy Scully, and Jorge Vargas Cullell. 2010. "Measuring Success in Democratic Governance." In *Democratic Governance in Latin America*, ed. S. Meanwaring and T. Scully. Stanford, California: Stanford University Press.

Mainwaring, Scott, and Timothy R. Scully, eds. 2010. *Democratic Governance in Latin America*. Standford; California: Stanford University Press.

Maiztegui, Julio I., Kelly T. McKee Jr., Julio G. Barrera Oro, Lee H. Harrison, Paul H. Gibbs, Maria R. Feuillade, Delia A. Enria, Ana M. Briggiler, Silvana C. Levis, Ana M. Ambrosio, Neal A. Halsey, Clarence J. Peters, and the AHF Study Group. 1998. "Protective Efficacy of a Live Attenuated Vaccine against Argentine Hemorrhagic Fever." *The Journal of Infectious Diseases* (177):277-83.

Maurino, Gustavo, Ezequiel Nino, and Martín Sigal. 2005. *Las Acciones Colectivas. Análisis Conceptual, Constitucional, Procesal, Jurisprudencial y Comparado*. Buenos Aires: Lexis Nexis Argentina.

McCubbins, Mathew D., and Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms." *American Journal of Political Science* 28 (1):165-79.

Meyer, David S. 2004. "Protest and Political Opportunities." *Annual Review of Sociology* 30:125-45.

Millón Quintana, Joaquin. "Triunfos de papel. A propósito de Viceconte." Buenos Aires: Universidad de Palermo.

Mineria Meridian Austral S.A. *Proyecto Cordón Esquel* [cited December 12, 2007. Available from http://www.minerameridianaustral.com/proyectos_esquel_legislacion.cfm.

Molero, Pablo. 2002a. "Nota para padres y responsables sobre la situación actual de la atención de las personas con discapacidad. Decreto de Emergencia Sanitaria." FORO PRO.

———. 2002b. "Resumen Reunion del Directorio del Sistema Unico de Prestaciones Básicas para las Personas con Discapacidad del 2 de abril de 2002." FORO PRO.

Morgenstern, Scott, and Luigi Manzetti. 2003. "Legislative Oversight: Interests and Institutions in the United States and Argentina." In *Democratic Accountability in Latin America*, ed. S. Mainwaring and C. Welna. New York: Oxford University Press.

Morgenstern, Scott, and Benito Nacif, eds. 2002. *Legislative Politics in Latin America*. New York: Cambridge University Press.

Munck, Gerardo L. 2004a. "Democratic Politics in Latin America: New Debates and Research Frontiers." *Annual Review of Political Science* 7:437-62.

———. 2004b. "Tools for Qualitative Research." In *Rethinking Social Inquiry: Diverse Tools, Shared Standards*, ed. H. E. Brady and D. Collier. Lanham, Md: Rowman & Littlefield Publishers.

Mustapic, Ana María. 2002. "Oscillating Relations: President and Congress in Argentina." In *Legislative Politics in Latin America*, ed. S. Morgenstern and B. Nacif. Cambridge: Cambridge University Press.

Nápoli, Andrés. 2009. "Una política de Estado para el Riachuelo." In *Informe Ambiental Anual 2009*, ed. M. E. D. Paola, F. Sangalli and S. Caorsi. Buenos Aires: FARN.

Nápoli, Andrés, and Javier García Espil. 2010. "Recomposición Ambiental de la Cuenca Matanza-Riachuelo: una oportunidad histórica que aún reclama un fuerte

compromiso político y más eficiencia en la gestión." In *Informe Ambiental Anual 2010*, ed. M. E. D. Paola and F. Sangalli. Buenos Aires: FARN.

Noticias CEAMSE. 2004. "Villa Domínico: El fín de una etapa." Nro. 18, Nov - Dic 2004.

———. 2005. "¿Y ahora qué?", Nro. 19, abril - mayo 2005.

Nuñes, Rolando. 2008. "Pueblo Indígena Toba de la Provincia del Chaco. El Centro Mandela rinde Informe ante la Comisión Interamericana de Derechos Humanos." Resistencia: Centro de Estudios e Investigación Social Nelson Mandela

O'Donnell, Guillermo. 1993. "On the State, Democratization and Some Conceptual Problems." *World Development* 21 (8).

———. 1994. "Delegative Democracy." *Journal of Democracy* 5 (1):55-69.

Olson, Mancur. 1965. *The Logic of Collective Action*. Cambridge, Mass: Harvard University Press.

Olson, Susan. 1984. *Clients and Lawyers. Securing the rights of disabled persons*. Westport: Greenwood Press.

———. 1990. "Interest Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory." *Journal of Politics* 52 (3):854-82.

Organización Panamericana de la Salud. 2008. "Crisis de Pueblos Originarios en Chaco. Misión de de la Organización Panamericana de la Salud (OPS). 24-26 de febrero de 2008. Informe Final."

Parizek, Bernardo. *Mina de Oro en Esquel. Cronología del proceso de Evaluación Ambiental. Evaluación en medio de cambios en la seguridad jurídica*. Desarrollo Sostenible 2008 [cited October 2008. Available from http://www.dsostenible.com.ar/situacion/esquel/cronologiabase.html.

Peruzzotti, Enrique, and Catalina Smulovitz, eds. 2002. *Controlando La Política: Ciudadanos y Medios en las Nuevas Democracias Latinoamericanas*. Buenos Aires: Temas.

PROCONSUMER. *Reestructuración Tarifaria Gestión Duhalde. La renegociación de los contratos de obras y servicios públicos hasta el 25 de mayo de 2003* [cited September 28, 2010. Available from http://www.proconsumer.org.ar/actualidad/renegiciacion_de_los_contratos.htm.

"PRODELCO v. Estado nacional s/amparo." 1997. Juzgado Federal de la Provincia de Mendoza.

Ragin, Charles C. 2005. "Core versus Tangential Assumptions in Comparative Research." *Studies in Comparative International Development* 40 (1):33-8.

———. 2008. *User's Guide to Fuzzy-Set / Qualitative Comparative Analysis*. Tucson, Arizona: Department of Sociology, University of Arizona.

Ragin, Charles C, Kriss Drass, and Sean Davey. 2006. "Fuzzy-Set / Qualitative Comparative Analysis 2.0."

Ragin, Charles C. 1987. *The Comparative Method: Moving beyond Qualitative and Quantitative Strategies*. Berkeley: University of California Press.

———. 2000. *Fuzzy-Set Social Science*. Chicago: University of Chicago Press.

———. 2004. "Turning the Tables: How case-oriented research challenges variable-oriented research." In *Rethinking Social Inquiry. Diverse Tools, Shared Standards*, ed. H. E. Brady and D. Collier. Lanham, MD: Rowman & Littlelield Publishers.

———. 2009. "Qualitative Comparative Analysis Using Fuzzy Sets (fsQCA)." In *Configurational Comparative Methods*, ed. B. Rihoux and C. C. Ragin. Thousand Oaks: SAGE Publications.

Ragin, Charles C., and John Sonnett. 2004. "Between Complexity and Parsimony: Limited Diversity, Counterfactual Cases and Comparative Analysis." In *Theory and Research in Comparative Social Analysis*. Los Angeles: University of California.

Ramsar Advisory Mission. 2002. "Informe Nro. 48. Sitio Ramsar Laguna de Llancanelo, Argentina." Gland, Switzerland: The Ramsar Convention on Wetlands.

"Report Nº 78/06. Petition 12.094 Admissibility. Aboriginal Community of Lhaka Honhat - Argentina." 2006. Inter-American Commission on Human Rights.

Rhodes, Sybil. 2006. *Social Movements and Free-Market Capitalism in Latin America: Telecomunications Privatization and the Rise of Consumer Protest*. Albany: State University of New York Press.

Rihoux, Benoit, and Gisele De Meur. 2009. "Crisp-Set Qualitative Comparative Analysis (csQCA)." In *Configurational Comparative Methods*, ed. B. Rihoux and C. C. Ragin. Thousands Oaks, California: Sage Publications.

Rihoux, Benoit, and Bojana Lobe. 2009. "The Case for Qualitative Comparative Analysis (QCA): Adding Leverage for Thick Cross-Case Comparison." In *The SAGE Handbook of Case-Based Methods*, ed. D. Byrne and C. C. Ragin. London: SAGE.

Rihoux, Benoit, and Charles C. Ragin, eds. 2009. *Configurational Comparative Methods: Qualitative Comparative Analysis (QCA) and Related Techniques*. Thousands Oak, California: SAGE Publications

Ríos-Figueroa, Julio, and Matthew Taylor. 2006. "Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico." *Journal of Latin American Studies* 38:739-66.

Russell, Peter, and David O'Brien, eds. 2001. *Judicial Independence In The Age of Democracy: Critical Perspectives From Around The World*. Charlottesville: University Press of Virginia.

Ryan, Daniel. 2004. "Ciudadanía y Control de Gobierno en la Cuenca Matanza Riachuelo. Informe de Investigación." Teresa Lozano Institute of Latin American Studies. University of Texas at Austin.

Sabatier, Paul, ed. 1999. *Theories of the Policy Process*. Boulder, Colo: Westview Press.

Sabsay, Daniel Alberto. 1997. "El 'Amparo Colectivo' consagrado por la Reforma Constitutional del 1994." *Cuadernos de Análisis Jurídicos* 7 (Abril):387-405.

Sathe, S. P. 2002. *Judicial Activism in India: Transgressing Borders and Enforcing Limits*. 2 ed. New Delhi: Oxford University Press.

Scandizzo, Hernán, and Ana Valtriani. 2003. "Mineria y Movilizacion Social: El Caso Esquel - Chubut." In *Terceras Jornadas Interdisciplinarias de Estudios Agrarios y Agroindustriales*. Facultad de Ciencias Económicas, UBA, Buenos Aires.

Senado de la Provincia de Buenos Aires. 2001. *Diario de Sesiones del Senado de Buenos Aires*. 129,1. December 27.

Senado de la Provincia de Buenos Aires. 2003. *Diario de Sesiones del Senado de Buenos Aires*. 131, 4. May 8.

Sieder, Rachel, Line Schjolden, and Alan Angell. 2005. "Introduction." In *The Judicialization of Politics in Latin America*, ed. R. Sieder, L. Schjolden and A. Angell. New York: Palgrave Macmillan.

Smulovitz, Catalina. 2005. "Petitioning and Creating Rights: Judicialization in Argentina." In *The Judicialization of Politics in Latin America*, ed. R. Sieder, Schjolden, Line and Angell, Alan. New York: Palgrave Macmillan.

———. 2007. "Judicialization in Argentina: Legal Culture or Taking Advantage of Opportunities?" In *International Conference Law and Society Association*. Berlin.

Sosa, Eduardo. 2005. "Llaguna Llancanelo y el dilema de la sustentabilidad." In *Conflictos Socio-Ambientales en la provincia de Mendoza*, ed. A. Scoones and E. Sosa. Mendoza: Oikos Ambiental.

Sosa, Heber. 1995. "Information Sheet on Ramsar Wetlands: Llancanelo." Dirección de Bosques y Recursos Naturales Renovables del Gobierno de la provincia de Mendoza.

Stone Sweet, Alec. 2000. *Governing with Judges: Constitutional Politics in Europe*. Oxford; New York: Oxford University Press.

Suarez, Francisco M. 1998. "Que las recojan y arrojen fuera de la ciudad. Historia de la gestión de los residuos sólidos (basuras) en Buenos Aires." Universidad General Sarmiento: Instituto del Conurbano.

Tarr, Alan G. 2010. *Judicial Process & Judicial Policymaking*. 5th ed. Boston: Wadsworth.

Tate, Neal C. , and Torbjorn Vallinder, eds. 1995. *The Global Expansion of Judicial Power*. New York: New York University Press.

Tate, Neal C. 1995. "Why the Expansion of Judicial Power?" In *The Global Expansion of Judicial Power*, ed. N. C. Tate and T. Vallinder. New York: New York University Press.

Taylor, Matthew M. 2004. "El Partido de los Trabajadores y el uso Político del Poder Judicial." *América Latina Hoy* 37 (Agosto):121-42.

———. 2008. *Judging Policy. Courts and Policy Reform in Democratic Brazil*. Sanford, California: Stanford University Press.

TBA Trenes de Buenos Aires. *Historia de nuestra concesión* [cited November 26, 2008. Available from http://www.tbanet.com.ar/empresa/historia.asp.

Theodoulou, Stella Z., and Matthew A. Cahn, eds. 1995. *Public Policy: The Essential Readings*. Uper Saddle River, NJ: Prentice Hall.

Tilly, Charles. 1978. *From Mobilization to Revolution*. Reading, Mass.: Addison-Wesley Publisher.

Tow, Andy. *Atlas de Elecciones en Argentina* [cited December 16, 2009. Available from http://towsa.com/andy/.

Tushnet, Mark. 2004. "Social Welfare Rights and the Forms of Judicial Review." *Texas Law Review* 82:1894-919.

"Unión de Usuarios y Consumidores c/ Secretaria de Transporte y Otros (juicio sumarisimo)." 1999.

"Unión de Usuarios y Consumidores y Otros c/ Ministerio de Economia e Infraestructura -Resol 20/20 Amp. Proc. Sumarisimo." 2003.

"Unión de Usuarios y Consumidores y Otros c/ Ministerio de Economia e Infraestructura -Resol 20/20 Amp. Proc. Sumarisimo (causa 162.765/02)." 2002.

"Unión Industrial de Córdoba v. estado nacional s/ medida cautelar autónoma." 1997. Juzgado Federal Nro 1 de Córdoba.

"United States v. Carolene Products Co.". 1938. US Supreme Court.

Urbiztondo, Santiago, Daniel Artana, and Fernado Narvaja. 1998. "La Autonomía de los Nuevos Entes Reguladores Argentinos." *Desarrollo Económico* 38 (Autumn):7-40.

"Viceconte, Mariela Cecilia c/Estado Nacional -Ministerio de Salud y Acción Social- s/ amparo ley 16.968." 1998. Cámara Contencioso Administrativa Federal, Sala V.

"Villivar, Silvana c/ Provincia del Chubut y Otros s/Amparo –Expte 1365." 2003.

Viñas, Adriana, Ricardo Scoles, and Carlos Scally. 2007. "Informe sobre presunta violación de derechos humanos fundamentales de pobladores que habitan el Impenetrable Chaqueño (Actuación 3666/07)." Buenos Aires: Defensor del Pueblo de la Nación.

Walter, Mariana. 2008. "Nuevos Conflictos Ambientales Mineros en Argentina. El Caso Esquel (2002-2003)." *Revista Iberoamericana de Economía Ecológica* 8:15-28.

Weyland, Kurt. 2002. "Limitations of rational-choice institutionalism for the study of Latin American politics." *Studies in Comparative International Development* 37 (3 spring):57-85.

Whittington, Keith E. 2005. ""Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court " *American Political Science Review* 99 (November):583-96.

Wilson, Bruce, and Juan Carlos Rodriguez Cordero. 2006. "Legal Opportunity Structures and Social Movements: The effects of institutional change on Costa Rican politics." *Comparative Political Studies* 39 (3):325-51.

Wilson, James Q. 1995. *Political Organizations*. Princeton, New Jersey: Princeton University Press.

Vita

Daniel E. Ryan was born and grew up in Rio Cuarto, Argentina. Daniel received a J.D. from the School of Law and Social Sciences of the Universidad Nacional de Cordoba (Argentina, 1993), a LLM on Environmental Law from SOAS at the University of London (UK, 1996), and a postgraduate degree in Direction of Nonprofit Organizations from Universidad Di Tella – Universidad San Andres - CEDES (Argentina, 1998). Between 1997 and 2003, Daniel worked as Deputy Executive Director of Fundación Ambiente and Recursos Naturales (FARN, Argentina). In 2004, he entered the doctoral program in Government at the University of Texas at Austin, where he graduated in August 2011. Daniel has obtained several grants and fellowships from several institutions including the British Council, Fulbright Commission, the Teresa Lozano Long Institute of Latin American Studies and the Department of Government of the University of Texas at Austin

Permanent email: dryan2003@yahoo.com.ar

This dissertation was typed by the author.